OCTOBER TERM, 1969

Supreme Court of the United States

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER

v.

JONATHAN TODD BYERS, RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF CALIFORNIA

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In the Supreme Court
of the State of California

No. S. F. 22634

Jonathan Todd Byers,
Plaintiff and Respondent,

v.

The Justice Court for the Ukiah Judicial District of Mendocino County,
Defendant and Respondent;

The People,
Real Party in Interest and Appellant.

RELEVANT DOCKET ENTRIES

November 4, 1968—Petition for Hearing filed by The People
November 6, 1968—Petition for Hearing filed by the respondent Byers
November 20, 1968—Hearing granted
February 3, 1968—Cause called and argued
September 16, 1969—Cause submitted and judgment of Superior Court affirmed
October 1, 1969—Petition for Rehearing filed by the People
October 15, 1969—Rehearing denied
October 17, 1969—Remittitur issued

1/Civil No. 24557

In the Court of Appeal of the State of California
First Appellate District, Division Three

Jonathan Todd Byers,
Plaintiff and Respondent,
v.
The Justice Court for the Ukiah Judicial District, County of Mendocino, State of California,
Defendant and Respondent;
The People of the State of California,
Real Party in Interest and Appellant.

RELEVANT DOCKET ENTRIES

May 4, 1967—Clerk's Transcript on Appeal filed
August 16, 1967—Opening brief filed by The People
March 5, 1968—Respondent's brief filed by respondent Byers
March 25, 1968—Reply brief filed by The People
July 19, 1968—Cause called, argued and submitted
September 23, 1968—Judgment of Superior Court granting the writ of prohibition is reversed
October 8, 1968—Petition for rehearing and/or modification filed by The People
October 23, 1968—Rehearing and/or modification denied

The Superior Court of the State of California
County of Mendocino

No. 28366

Jonathan Todd Byers,
Petitioner,

v.

The Justice Court for the Ukiah Judicial District, County of Mendocino, State of California,
Respondent.

RELEVANT DOCKET ENTRIES

January 13, 1967—Petition for Writ of Prohibition and Points and Authorities in Support filed by respondent Byers; alternative Writ of Prohibition issued by court

January 20, 1967—Demurrer to Petition for Writ of Prohibition and Points and Authorities in Support of Demurrer and in Opposition to Granting the Peremptory Writ of Prohibition filed by The People

January 27, 1967—Petition and Demurrer argued and submitted

February 17, 1967—Writ of Prohibition issued and Memorandum Opinion filed

February 24, 1967—Order overruling Demurrer filed by court

March 21, 1967—Findings of Fact and Conclusions of Law filed; Permanent Writ of Prohibition issued and Judgment Granting Permanent Writ of Prohibition filed

March 22, 1967—Notice of Appeal filed

In the Justice Court for the Ukiah Judicial District
County of Mendocino, State of California

No. A 40692

The People of the State of California,
Plaintiff,

v.

Jonathan Todd Byers,
Defendant.

RELEVANT DOCKET ENTRIES

August 22, 1966—Criminal complaint filed

September 8, 1966—Demurrer and Points and Authorities filed

December 7, 1966—Demurrer overruled

S. F. 22634

District Court of Appeal
State of California
First Appellate District

1 Civ. 24557
Endorsed-Filed Apr 18 1967
Viola N. Richardson, County Clerk

Appeal from
The Superior Court of the State of California
County of Mendocino
Honorable Robert L. Winslow, Judge

Filed May 4, 1967
Court of Appeal, First App. Dist.
Lawrence R. Elkington, Clerk
By .....
Deputy

Jonathan Todd Byers
Plaintiff and Respondent
vs
The Justice Court for the
Ukiah Judicial District, etc.
Defendants and Respondent.
People of the State of California
Real Party In Interest and Appellant.

DCA
NO.....

Appearances:

For the Petitioner:

Rawles, Nelson, Golden & Poulos
Attorneys at Law
P.O. Box 720
Ukiah, California 95482

For the Respondent: (Appellant):

Arthur B. Broaddus, District Attorney
P.O. Box 185
Ukiah, California 95482

Filed Jan 13, 1967
Viola N. Richardson, County Clerk

The Superior Court of the State of California
For the County of Mendocino

No. 28366

Jonathan Todd Byers,
Petitioner,

vs.

The Justice Court for the Ukiah Judicial District, County of Mendocino, State of California,
Respondent.

PETITION FOR WRIT OF PROHIBITION

Petitioner respectfully shows:

I

On or about August 22, 1966, a criminal complaint was issued and docketed in the Justice Court, for the Ukiah Judicial District, County of Mendocino, State of California, charging your petitioner with a violation of Section 21750 and Section 20002 Subdivision (a) of the Vehicle Code of the State of California. Said complaint was docketed in Volume 91, Page 186 of the records of the said Court and was assigned Case No. A40692. A true copy of said complaint is attached hereto marked Exhibit A and is hereby referred to and made a part hereof as fully as though herein set forth at length.

II

Petitioner was duly arrested on said charges contained in said complaint and held in the custody of the Sheriff of the County of Mendocino, State of California. Thereafter,

and pursuant to petitioner's request, the Honorable Hale McCowan, Jr., Judge of the Justice Court for the Ukiah Judicial District, County of Mendocino, State of California, released petitioner upon his own recognizance from the custody of the Sheriff of the County of Mendocino, and petitioner is now free of his own recognizance. [2*]

III

Petitioner was duly arraigned in the Justice Court for the Ukiah Judicial District, County of Mendocino, State of California, and petitioner, within the time provided by law, filed his written demurrer to the complaint and the charges set forth therein urging that Vehicle Code Section 20002, Subdivision (a) was unconstitutional both upon its face and as applied to petitioner in Count II of said complaint. A true copy of said demurrer is attached hereto marked Exhibit B and is hereby referred to and made a part hereof as fully as though herein set forth at length.

IV

After filing said demurrer, the same was argued before the Justice Court for the Ukiah Judicial District, County of Mendocino, State of California, and at said hearing it was stipulated by and between Timothy Stoen, Esq., Deputy District Attorney and John W. Poulos, Esq., attorney for petitioner, and so ordered by said Court that said complaint be amended upon its face to add the allegation that offenses charged in Count I and Count II of said complaint were the same class of offenses and connected together in their commission.

V

After said hearing the Justice Court for the Ukiah Judicial District, County of Mendocino, State of California, took said matter under advisement and on or about De-

*Brackets indicate page numbering of Clerk's Transcript on Appeal and follow page materials set forth.

cember 7, 1966, the Court overruled said demurrer and set the date for [3] the arraignment of petitioner for the purposes of entering a plea upon said complaint for December 9, 1966. At the request of your petitioner said Justice Court continued said arraignment until Friday, January 13, 1967, at the hour of 11 o'clock A. M. for the purpose of arraigning the petitioner for the entrance of a plea upon the charges contained in said complaint.

VI

The said Justice Court for the Ukiah Judicial District, County of Mendocino, State of California, is wholly without jurisdiction to proceed to arraign and try the petitioner for an alleged violation of Section 20002 Subdivision (a) of the Vehicle Code of the State of California, in that under the facts of this case, and as above alleged, when the complaint charges two offenses connected together in their commission, said Section 20002 Subdivision (a) requires the petitioner to give evidence against himself and destroys his right to remain silent, contrary to the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section XIII of the California Constitution.

VII

Unless restrained and prohibited by Order of this Court, the said Justice Court for the Ukiah Judicial District, County of Mendocino, State of California, threatens to, intends to, and will require your petitioner to enter a plea upon the charges contained in Count II of said complaint and pass upon, hear and try said charges. [4]

VIII

Your petitioner has no plain, speedy, and adequate remedy in the ordinary course of law. The remedy by appeal from any judgment which might be rendered in the action

herein referred to, now pending in the Justice Court for the Ukiah Judicial District, County of Mendocino, Staate of California, is in no wise adequate and speedy for the reason that the personal hardship to be suffered by your petitioner is much greater than in a civil case and there is a strong public interest in avoiding the waste of time and expense of a futile trial and appeal, and in securing a prompt determination of the constitutionality of Section 20002, Subdivision (a) of the Vehicle Code of the State of California, as applied to petitioner in this case.

IX

Your petitioner is the party having beneficial interest in this proceeding and the names of the parties interested who will be affected by this petition are your petitioner, the respondent Court and the People of the State of California.

X

No prior application for the Writ sought by this petition or any other Writ pertaining to this matter, has been made by your petitioner.

XI.

The issuance of an Alternate Writ of Prohibition ex parte, without notice or service, will not in any way prejudice [5] any rights of the People of the State of California, but, on the contrary, will protect and preserve the rights of all parties beneficially interested and will further the cause of justice.

WHEREFORE, petitioner prays that an Alternative Writ of Prohibition restraining respondent Court from further proceedings on Count II of the complaint in the case of the People of the State of California vs. Jonathan Todd Byers, Case No. A40692, now pending in the Justice Court for the Ukiah Judicial District, County of Mendo-

cino, State of California, until further Order of this Court issue immediately; that this Court enter its Order dispensing with the requirements of notice and service; that the Clerk of this Court be ordered to accept this petition for filing; and that respondent and the People of the State of California be ordered to appear before this Court at a date and time set by this Court, then and there to show cause why a peremptory Writ of Prohibition should not issue herein.

Dated: January 12, 1967.

RAWLES, NELSON, GOLDEN & POULOS
By /s/ JOHN W. POULOS

I hereby declare under penalty of perjury that I am the petitioner in the above-entitled action; that I have read the foregoing Petition for Writ of Prohibition and know the [6] contents thereof, and that the same is true of my own knowledge except as to the matters which are therein stated upon my information and belief, and as to those matters I believe it to be true.

Executed by me this 12th day of January 1967, at Ukiah, California.

s/ JONATHAN TODD BYERS
Jonathan Todd Byers [7]

EXHIBIT "A"

In the Justice Court for the Ukiah Judicial District
County of Mendocino, State of California

Docket #91 Page 186
Case No. 91-6-A40692

The People of The State of California,
Plaintiff,

vs.

Jonathan Todd Byers,
Defendant.

COMPLAINT—CRIMINAL
(MISDEMEANOR)
COUNT ONE

The undersigned, first being duly sworn, on information and belief, complains and says:
That said defendant... did in the Ukiah Judicial District, County of Mendocino, State of California, on or about the 20th day of August, 1966, commit the crime of MISDEMEANOR, to-wit, violation of Section 21750 of the Vehicle Code of the State of California, in that said defendant... did then and there while overtaking another vehicle proceeding in the same direction, fail to pass to the left at a safe distance as required by said Section of the Vehicle Code.

COUNT TWO

The undersigned, being further sworn, says upon information and belief, that said defendant did in the Ukiah

Judicial District, County of Mendocino, State of California, on or about the 20th day of August, 1966, commit the crime of MISDEMEANOR, to-wit, violation of Subdivision (a) of Section 20002 of the Vehicle Code of the State of California, in that [8] said defendant being then and there the driver of a vehicle involved in an accident resulting in injury to property did fail to immediately stop such vehicle at the scene of the accident, did fail to locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, did fail to leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and did without necessary delay, fail to notify the local headquarters of the Department of the California Highway Patrol.

Aug. 29, 1966
10:00

Complainant therefore prays that a Warrant issue and that said defendant... be dealt with according to law.

Subscribed and sworn to before me this 22nd day of August, 1966.

s/ Roy L. Burton
s/ Hale McCowen, Jr. (SEAL)
Magistrate [9]

EXHIBIT "B"

In the Justice Court for the Ukiah Judicial District
County of Mendocino, State of California

No. A 40692

The People of The State of California,
Plaintiff,

vs.

Jonathan Todd Byers,
Defendant.

DEMURRER AND MEMORANDUM OF POINTS AND AUTHORITIES

The defendant in this action demurs to County Two of the complaint and the complaint upon the following grounds:

I

The complaint charges more than one offense contrary to the provisions of Section 954 of the Penal Code, in that the offenses charged in Counts One and Two are not of the same class.

II

The complaint charges more than one offense contrary to the provisions of Section 954 of the Penal Code, in that it does not appear that the offenses charged in Counts One and Two were connected together in their commission.

III

The complaint charges more than one offense contrary to the provisions of Section 954 of the Penal Code, in that it

does not appear that they charge the same offense differently stated.

IV

The facts stated in Count Two of the complaint does [10] not constitute a public offense because to require the defendant who was a driver involved in an accident resulting in injury to property to immediately stop the vehicle he has driving at the scene of the accident, locate and notify the owner or person in charge of said property of the name and address of the driver and owner of the vehicle involved and leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of circumstances thereof, and to require without necessary delay notification of the local headquarters of the Department of the California Highway Patrol when the defendant is also charged with another offense arising out of the same accident requires the defendant to give evidence against himself contrary to the Fifth and Fourteenth Amendments to the United States Constitution and Article I Section XIII of the California Constitution.

Dated: September 8, 1966

RAWLES, NELSON & GOLDEN
By *Attorneys for Defendant*

MEMORANDUM OF POINTS AND AUTHORITIES

I

The exception from compulsory self-incrimination created by the Fifth Amendment to the United States Constitu-

tion is protected by the Fourteenth Amendment against abridgment by [11] the States.

Malloy v. Hogan, 84 S.Ct. 1489 at 1493 (1964)

II

The privilege against self-incrimination is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will.

Malloy v. Hogan, supra; *Escobedo v. State of Illinois,* 84 S.Ct. 1758 (1964); *Miranda v. State of Arizona,* 86 S.Ct. 1602 (1968); *People v. Dorado,* 42 Cal. Reptr. 169 at 179.

III

"We turn to the petitioner's claim that the State of Connecticut denied him the protection of his federal privilege. We recently elaborated the content of the federal standard in Hoffman:

"The privilege afforded not only extends to answers that would in themselves support a conviction * * * but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute. * * * (I)f the witness, upon interposing his claim, were required to prove the hazard * * * he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could [12] result." 341 U.S., at 486-487, 71 S.Ct. at 818."

Malloy v. Hogan, 84 S.Ct. 1489 at 1495 and 1496 (1964)

IV

Section 2002 of the Vehicle Code (as it read in 1964) has been held to violate the Fifth and Fourteenth Amendments to the United States Constitution where the defendant is charged with another offense resulting from the accident in question.

People v. Mitchell, Superior Court of the State of California for the County of Mendocino, Case No. 3948-C.

Dated: September 8, 1966

Respectfully submitted,
RAWLES, NELSON & GOLDEN
By..... [13]

Filed: Jan 13 1967
Viola N. Richardson, County Clerk

The Superior Court of the State of California
for the County of Mendocino

(Title omitted)

ALTERNATIVE WRIT OF PROHIBITION

The People of the State of California to respondent Justice Court for the Ukiah Judicial District, County of Mendocino, State of California:

WHEREAS, the verified petition of JONATHAN TODD BYERS shows that you, the respondent are proceeding to arraign and try the petitioner for an alleged violation of Section 20002, Subdivision (a) of the Vehicle Code of the State of California, allegedly without jurisdiction to do so; and

WHEREAS, the said verified petition shows that petitioner has no plain, speedy and adequate remedy at law, and that an alternative Writ of Prohibition should issue;

THEREFORE, you are commanded to desist and refrain from arraigning the petitioner for the entrance of a plea to Count II and from trying and taking any further proceedings whatsoever in connection with said Count II of the complaint now pending in the Justice Court for the Ukiah Judicial District, County of Mendocino, State of California, which said complaint is docketed in Volume 91, Page 186 of the records of said Court and assigned Case No. A40692, until further order of this Court, and to show cause, if any you have, before this Court at 8:30 A. M. on January 27, 1967, in Department 1 of the above entitled

Court in the Mendocino County Court- [14] house, Ukiah, County of Mendocino, State of California, or as soon thereafter as the matter can be heard, why you should not be absolutely restrained from arraigning the defendant for the purposes of entering a plea upon Count II and from trying and taking any further proceedings upon said Count II contained in that complaint docketed in Volume 91, Page 186 of the records of said Court and assigned Case No. A40692.

• • • •

Dated: January 13, 1967.

s/ ROBERT L. WINSLOW
Judge of the Superior Court [15]

(Declaration of Service Omitted in Printing)

Filed: Jan 13 1967
Viola N. Richardson, County Clerk

The Superior Court of the State of California
for the County of Mendocino

(Title omitted)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

Petitioner submits the following points and authorities in support of his petition for writ of prohibition

I

A writ of prohibition may issue on the verified petition of the person beneficially interested to arrest the proceedings of an inferior tribunal exercising judicial functions when such proceedings are without, or in excess of, the jurisdiction of such tribunal and there is no plain, speedy, and adequate remedy in the ordinary course of law.

Code of Civil Procedure, Section 1102
Code of Civil Procedure, Section 1103

II

When the claimed constitutional infirmity appears on the face of the statute upon which a persecution is based, prohibition is an appropriate means to challenge the constitutionality of the statute in question.

Canon vs. Justice Court (1964) 61 Cal. 2d 446; 39 Cal. Rptr. 228

Rescue Army vs. Municipal Court (1962) 28 Cal. 2d 460

Moore vs. Municipal Court 170 Cal. App. 2d, 548

Lambert vs. Municipal Court 53 Cal. 2d 690; 3 Cal. Rptr. 168 [16]

III

Prohibition is the appropriate remedy to determine whether or not a statute is being unconstitutionally applied in any given case when the remedy of appeal is inadequate.

Patterson vs. Muncipal Court 232 Cal. App. 2d 289; 42 Cal. Rptr. 769

IV

". . . Moreover, criminal cases tried in municipal courts get special consideration; Tobriner, J., summarized the inadequacy of other remedies in these cases in Moore v. Municipal Court (1959) 170 Cal. App. 2d 548, 552, 339 P.2d 196, 198: 'The most recent cases recognize that the requirement that a defendant in a criminal case stand trial by a court which acts without or in excess of its jurisdiction is an imposition of personal hardship upon the defendant and a futile expense to the public * * The burden becomes particularly acute in a situation in which the defendant must appeal to the appellate department of the superior court and he has no remedy of certiorari' ".

Patterson vs. Municipal Court, supra 232 Cal. App. 2d 289; 42 Cal. Rptr. 769 at 771

V

The privilege from compulsory self-incrimination created by the Fifth Amendment to the United States Constitution is protected by the Fourteenth Amendment against abridgment by the States. [17]

Malloy vs. Hogan (1964) 84 S.Ct. 1489 at 1493.

VI

A State must apply Federal standards to determine whether or not the requirements of the Fifth and Fourteenth Amendments are being met.

Malloy vs. Hogan, supra 84 S.Ct. 1489 at 1493

VII

The privilege against self-incrimination is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will.

Malloy vs. Hogan, supra 84 S.Ct. 1489 at 1493
Escobedo vs. State of Illinois (1964) 84 S.Ct. 1758
Miranda vs. State of Arizona (1966) 86 S.Ct. 1602
People vs. Dorado 42 Cal. Rptr. 169 at 179

VIII

"We turn to the petitioner's claim that the State of Connecticut denied him the protection of his federal privilege ... We recently elaborated the content of the federal standard in Hoffman:

"The privilege afforded not only extends to answers that would in themselves support a conviction * * * but like- [18] wise embraces those which would furnish a link in the chain of evidence needed to prosecute. * * * (I)f the witness, upon interposing his claim, were required to prove the hazard * * * he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." 341 U.S., at 486-487, 71 S.Ct. at 818."

Malloy vs. Hogan, supra (1964) 84 S.Ct. 1489 at 1495 and 1496

The Fifth Amendment privilege against self-incrimination does not apply simply to judicial proceedings, but ren-

ders unconstitutional a statute which requires the abridgment of that privilege.

Albertson vs. Subversive Activities Control Board
382 U.S. 70, 86 S.Ct. 194, 15 L.Ed. 2d 165

X

"Section 4(f) of the Act, the purported immunity provision, does not save the registration orders from petitioners' Fifth Amendment challenge. In Counselman v. Hitchcock, 142 US 547, 35 L ed 1110, 12 S Ct 195, decided in 1892, the Court held 'That no (immunity) statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privi- [19] lege . . .,' and that such a statute is valid only if it supplies 'a complete protection from all the perils against which the constitutional prohibition was designed to guard . . . .' by affording 'absolute immunity against future prosecution for the offense to which the question relates.' Id., at 585-586, 35 L ed at 112. Measured by these standards, the immunity granted by Sec. 4 (f) is not complete. See Scales v United States, 367 US at 206-219, 6 L ed 2d at 788-795. It does not preclude any use of the information called for by Form IS-52, either as evidence or as an investigatory lead. With regard to the act of registering on Form IS-52a, Sec. 4(f) provides only that the admission of Party membership thus required shall not per se constitute a violation of Secs. 4 (a) and (c) or any other criminal statute, or 'be received in evidence' against a registrant in any criminal prosecution; it does not preclude the use of the admission as an investigatory lead, a use which is barred by the privilege. Counselman v Hitchcock, 142 US, at 564-565, 35 L ed at 1114, 1122."

Albertson vs. Subversive Activities Control Board, sup 382 US 70, 86 S.Ct. 194, 15 L ed 2d 165 at 172

XI

"The words, 'No person shall . . . be compelled, in any criminal case, to be a witness against himself' mean that no person shall be compelled to make any statement, orally or in writing, anywhere or at any time, which may be made use of against him in any criminal prosecution, then pending or which might thereafter be brought against him. With almost complete [20] unanimity the cases find in the words more than is literally there. The prosecution afforded includes but goes beyond the assurance to a defendant on trial in a criminal case that he will not be compelled to testify against himself. The protection intended applies even before the commencement of a criminal case and secures one who may reasonably be expected to be a defendant from furnishing amunition to be used against him."

People vs. McCormick (1951) 102 Cal. App. 2d Supp. 954 at 957; 228 P.2d 349

XII

An ordinance may not abridge the privilege against self-incrimination contained in the California Constitution, Article I, Section XIII and that privilege does not extend simply to jurisdictional proceedings, but applies equally to a statutory interference.

People vs. McCormick, supra (102 Cal. App. 2d Supp. 954

XIII

Section 20002 of the Vehicle Code (as it read in 1964) has been held to violate the Fifth and Fourteenth Amendments to the United States Constitution where the defendant is charged wih another offense resulting from the accident in question.

People vs. Mitchell, Superior Court of the State of California for the County of Mendocino, Case No. 3948-C.

Dated: January 13, 1967.

Respectfully submitted,
RAWLES, NELSON, GOLDEN & POULOS
By s/ John Poulos [21]

Filed: Jan 20, 1967
Viola N. Richardson, County Clerk

The Superior Court of the State of California
for the County of Mendocino

(Title omitted)

DEMURRER

Comes now the Respondent and demurs to the Petition on file herein on the grounds that the Petition for Writ of Prohibition fails to state facts sufficient to constitute a cause of action.

Dated: January 19, 1967.

ARTHUR B. BROADDUS
District Attorney
By s/ THOMAS B. SAWYER
Thomas B. Sawyer
Deputy District Attorney
Attorney for Respondent [32]

Filed: January 20, 1967
Viola N. Richardson, County Clerk

The Superior Court of the State of California
for the County of Mendocino

(Title omitted)

POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER AND IN OPPOSITION TO GRANTING THE PEREMPTORY WRIT OF PROHIBITION

1.

The respondent may demur to a petition which is insufficient as a matter of law.

Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal. 2d 317; 364 P.2d 659.

2.

The petition alleges that Section 2002(a) of the Vehicle Code is unconstitutional as in violation of the state and federal constitutional provisions against self-incrimination. The petition contains all the essential facts of the record below and presents the constitutional question only. If the Vehcile Code is constitutional, then the petition must fail.

It is submitted that the Vehicle Code is constitutional on two grounds, first on the grounds that the privilege against self-incrimination does not apply to the information requested in the "hit and run" situation and secondly, driving a vehicle on a public highway constitutes a waiver of the constitutional right to the extent here involved.

2A.

The privilege against self-incrimination is not applicable. Section 20002(a) as here involved reads as follows: [22]

"The driver of any vehicle involved in an accident resulting in damage to any property . . . shall . . .

(2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol."

The requirement here does not require admission of a crime. It is equally applicable whether the driver is at fault or is wholly innocent of crime or civil fault. All statutes are to be construed to be constitutional if possible.

In re Thevenins' Adoption (1961) 189 CA2d 245; 11 Cal. Rptr. 219)

Accordingly, this statute can only mean that the driver is required to give only essential information. Requiring name and address and the fact that an accident had occurred, does not incriminate the driver, unless there were other circumstances not required to be reported. If a criminal case were pending and a "suspect" were under investigation, then the rule would apply as set forth in the *Miranda, Escobedo,* and *Dorado* cases. The rationale of those cases was to prevent police or other [23] officers of the government extracting information without advising the suspect of his rights. This role is recent as applied to State Courts, (see People v. Cahan, 202 P.2d 905) and was adopted as the only way to curb police abuses. In the Vehicle Code section, there is no problem of police brutality, or eavesdropping, or in-custody harrassment. None of the

dangers mentioned in the landmark cases is present. Were the driver is in fact innocent of negligence, civil wrong, or crime, there is privilege to protect.

Surely it would not be fair to say that a driver must leave his name when he is innocent, but not when he is at fault. This situation is not like the registration cases cited by petitioner.

A note in 3 Cal. Law Rev. 75 (1914) discusses a case holding valid a predecessor hit and run section as a constitutional regulation of highways.

People v. Diller, 24 CA 799; 142 P. 797

The claim was raised of self-incrimination in violation of Section 13, Article 1 of the Constitution of California. Similar statutes have been upheld against this claim in *Mo-Ex parte Kneedly,* 243 Mo. 632, 147 SW 983. *People v. Rosenchimer,* 209 NY 115, 102 N.E. 530, NY, case held state could prohibit operation of auto altogether and, therefore, could attach such conditions as they saw fit. "The driver of an automobile in the operation thereof exercises a privilege and not a right and as to such privilege it is competent for [24] the Legislature to prescribe the conditions upon which it shall be exercised." This is approved by California decision in summarizing the Mo. and New York cases, *People v. Diller,* 142 P. 797, 798. The *Diller* case expressly refuses to decide the result where a crime was committed. "Since no crime was committed, the constitutional provision could have no application and in such case the constitutional rights of defendant could not be infringed. The Court adopts the Missouri Kneedler case as follows:

> "Requirement of identity is lawful. The law does not make the accident a crime."

Other examples: Chauffer and owner to register names and number and display number on vehicle for obvious purpose of identification,

Persons in charge of mines must report accidents.

Physicians show prescription lists.

Dealers must deliver for inspection foods carried in stock.

Pawnbrokers must show book of articles received by him.

"We are not aware of any constitutional provision designed to protect a man's conduct from judicial inquiry, or aid him in fleeing from justice." (Mo. case)

"There can be no question but that this act including Section 12, (requires stop and give name and address) is a reasonable exercise of [25] the police power. The petitioner does not contend otherwise." (Mo. case)

People v. McCormick (1951) 102 Cal. App. 2d Supp. 954; 228 P.2d 349, relates to the constitutionality of County ordinance requiring registration by members of so-called Communist organizations. The Court held the requirement a violation of the self-incrimination provisions of the State Constitution. The case is distinguishable from the Vehicle Code section because the membership in the organization is a link in a chain of evidence of violation of the Criminal Syndicalism Act, which has already taken place. The decision itself distinguishes the vehicle act.

"Nor is the ordinance a simple police power regulation requiring the identification of citizens. The requirement of section 482, Vehicle Code, that the driver of a vehicle involved in an accident shall give his name, address and the registration number of his vehicle,

does not necessarily implicate the driver in the commission of a crime, for an accident is not a crime, per se. The constitutionality of this and similar statutes is approved in People v. Diller, 1914, 24 Cal. App. 799, 142 P. 797. The ordinance we are considering does not come into operation, however, until a violation of the Criminal [26] Syndicalism Act has occurred, and only one who is violating that act is compelled to register and by registering furnish, quite likely, some of the clews needed to establish his guilt. No such statute as this is looked upon with favor in the Diller case."

Albertson v. Subversive Activities Control Bd., 382 US 70, 16 L.Ed. 2d 165 (1965) holds that the act requiring the Communist Party members to register violated the constitutional right to privilege against self-incrimination. Here again we are not dealing with a registration requirement generally, but only members of a "highly select group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially regulatory inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admissiion of a criminal element of a crime." (156 Ed. P. 172).

The Court held the requirement that all persons file an income tax return was readily distinguishable as valid, citing the income tax case, *U. S. v. Sullivan,* 274 US 259, 7, L.Ed. 1037.

The Escobedo cases (Escobedo v. Ill., 84 S.Ct. 1758, *Miranda v. Arizona,* 86 S.Ct. 1802, *People v. Dorado,* 42 Cal. Rep. 169) do not purport to affect the constitutionality of hit and run statutes. These cases are all concerned with pro-

tecting [27] the right of a person accused, or suspected of an offense from interrogation by police or similar officers. The emphasis is on the atmosphere surrounding the suspect and the need for protection. The *Miranda* case, particularly, shows that this is the area of concern as the following quotations show. *Miranda v. Arizona,* supra, holds that "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."

> "From the foregoing (discussion of interrogation practices) we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the self-incrimination clause to determine its applicability in this situation." (1 6 L.Ed. 2d, p. 714)
>
> The privilege is a
>
> "Right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *U.S. v. Grunewald,* 233 F.2d 556, reviewed 353 U.S. 391. 1 L.Ed. 2d, 931, P. 715.
>
> "The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation.". 715. [28]

Malloy v. Hogan, 378 U.S. 1, 12 L.Ed. 2d, 653, 84 S.Ct. 1489 (1964) "necessitates an examination of the scope of the privilege in state cases as well." p. 717

> "The volitariness doctrine in the state cases, as Malloy indicates, encompasses all interrogation practices which are likely to exert such pressure upon an

individual as to disable him from making a free and rational choice." p. 717

"The entire thrust of police interrogation there, (Escobedo) as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment." p. 718

"General on the scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding . . . . In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. p. 725

In summary, the Vehicle Code Section does not violate the privilege against self-incrimination granted by the State and Federal Constitutions. The case law has extended the privilege from the courtroom to include detention and predetention interrogation, and to registration as a member of a [29] criminal society. Thus far it has not been extended to situations requiring giving information such as filing income tax returns, reporting on employment, business activities, etc.

We submit that under the general police power the State may make reasonable regulations of the non-criminal activities of its citizens, and as a concomitant thereof, require persons to supply information. The operation of a motor vehicle upon a highway is a dangerous activity and requires for the safety of users, reasonable regulations. The State may forbid the activity altogether and hence may require as a condition of the exercise of the privilege to use the highways of this State the reasonable requirement that persons involved in accidents comply with Section 20002(a)

of the Vehicle Code. The requirement applies alike to those who are innocent as to those who are guilty. The problem of protecting the person from police brutality, psychological pressure, trickery is not involved. The person's right to dignity and privacy is not infringed.

No person has a right to a "private enclave" in the traffic lane of a busy freeway. The operation of a dangerous instrumentality which in fact kills more citizens each year on our highways than are lost in warfare, requires reasonable regulations of the operator. This regulation has been affirmed as constitutional since the early days of the use of the automobile.

We request the writ be denied. [30]

Respectfully sumitted,

ARTHUR B. BROADDUS
District Attorney
By s/ THOMAS B. SAWYER
Thomas B. Sawyer
Deputy District Attorney
Attorney for Respondent [31]

MINUTES AND ORDERS, SUPERIOR COURT.
DEPARTMENT No. 1, Vol. 34, page 275

January 27, 1967

Hon. Robert L. Winslow, presiding
Clerk: Myrtle Turner
Reporter: Waldo Munday
Bailiff: Ken Stewart

This action came on the petition for writ of prohibition, John Poulos appearing for plaintiff and Tom Sawyer, Dep. D. A., appearing for defendant. Petition argued and submitted. Demurrer argued and submitted.

DEPARTMENT No. 1, Vol. 34, page 285

February 17, 1967

Hon. Robert L. Winslow, presiding
Clerk: Myrtle Turner
Reporter: Waldo Munday
Bailiff: Richard Phelps

The Court: The writ of prohibition sought by petitioner should be issued as prayed for. [33]

Filed: Feb. 17, 1967
Viola N. Richardson, County Clerk

The Superior Court of the State of California
for the County of Mendocino

(Title omitted)

MEMORANDUM OPINION

Petitioner Jonathan Todd Byers seeks a writ of prohibition to prevent the Justice Court of the Ukiah Judicial District from proceeding with a prosecution charging a violation of Vehicle Code Section 20002 (The hit-run Statute). The complaint involved consists of two counts, the first of which charges a violation of Vehicle Code Section 21750, and which alleges that the defendant "did then and there while overtaking another vehicle proceeding in the same direction fail to pass to the left at a safe distance as required by said section of the Vehicle Code."

At oral argument it was stipulated that the alleged violation of Vehicle Code Section 21750 resulted in an impact between the vehicle driven by the defendant and another vehicle and that the damage from this impact was the damage referred to in Count 2 of the complaint, where it is charged that the defendant "being then and there the driver of a vehicle involved in an accident resulting in injury to property did fail to immediately stop such vehicle at the scene of the accident, did fail to locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, did fail to leave in a conspicuous place on the vehicle, or other [34] property damaged, a written notice giving the name and address of the driver and of the owner

e vehicle involved and a statement of the circum-
s thereof, and did without necessary delay fail to
the local headquarters of the Department of the
rnia Highway Patrol."

ilure to comply with Vehicle Code Section 20002 con-
s a misdemeanor, which is subject to punishment by
onment in the County Jail for not to exceed six
s or by a fine of not to exceed $500.00 or by both.
ant to the provisions of Section 42001 a violation of
e Code Section 21750 is subject to the possibility of
ne and imprisonment and constitutes a misdemeanor.
uestion for decision in this case is whether a defend-
o is charged with a crime which is alleged to have
property damage to another can also be charged
nother crime for not identifying himself and other-
mplying with the provisions of Section 20002, though
ompliance would obviously provide evidence which
be used against him in the prosecution for a viola-
Section 21750 of the Vehicle Code. As will hereafter
, the Court has concluded the Section 20002 of the
e Code cannot be constitutionally applied in this
on. Such an application of Section 20002 of the
e Code violates the 5th Amendment's privilege not
riminate oneself. The Court's reasons for this con-
follow.

nalyzing this problem we start with the fact [35]
ne hit-run statutes have been held constitutional in
rnia in the case of People vs. Dillard, 24 Cal. App.
nd People vs. Fardera, 33 Cal. App. 8. At the time
cases were decided the provisions of the United
Constitution set forth in the 5th Amendment were
plicable to the states by reason of the holding in

Twining vs. New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 S.Ct. 14; Adamson vs. California, 332 U. S. 46, 97 S. Ed. 1903, 67 S.Ct. 1672.

Since the Dillard and Fardera cases the United States Supreme Court has over-ruled the Twining and Adamson cases in Malloy vs. Hogan, 12 Lawyers Edition 2nd 653, decided June 15, 1964. The Malloy case constitutes a clear, unequivocal holding that the privilege against self incrimination set forth in the 5th Amendment applies to the states and that the state courts must recognize the 5th Amendment and apply Federal standards in interpreting that amendment. In view of Malloy, it is now obviously necessary to reanalyze the hit-run situation and determine its constitutionality based upon current Federal law. Before examining the Federal cases it should be noted that most state courts have upheld hit-run statutes against the claim that they are self-incriminating. It should also be noted that these state court cases all predate Malloy vs. Hogan. These cases have, therefore, been interpreting their own constitutional provisions by their [36] own standards and not by Federal standards. The court in Malloy vs. Hogan, supra, stated:

> "The 14th Amendment secures against state invasion the same privilege that the 5th Amendment guarantees against Federal infringement—the right of a person to remain silent unless he chooses to speak in the exercise of his own will and to suffer no penalty for said silence."

The United States Supreme Court in Malloy vs. Hogan cites with approval Hoffman vs. United States, 341 U. S. 179, 95 L. Ed. 1118, 71 S. Ct. 814:

"The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . If the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosures could result."

The Malloy Court went on as follows: [37]

"We also said that in applying that test the judge must be 'perfectly clear', from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer cannot possibly have such tendency to incriminate."

The Malloy Court characterized their holding as a return to principles enunciated in the case of Boyd vs. The United States, 116 U. S. 616, 29 L. Ed. 746. The Boyd Court held unconstitutional an act authorizing a court of the United States in revenue cases to require the defendant to produce his books and records in court where upon his failure to do so the allegations of the attorney for the People in support of a motion for the production of the books would be considered as confessed. The court in holding the statute unconstitutional said:

"Now it is elementary knowledge that one cardinal rule of the Court of Chancery is never to decree a

discovery which might tend to convict the party of a crime . . . and a compulsory discovery by exacting the party's oath or compelling the production of his private books and papers to convict him of crime, or to forfeit his property, is contrary to the principles of free government."

The court continued:

"Constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives [38] them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more of sound than in substance. It is the duty of the court to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon."

In Counselman vs. Hitchcock, 35 Lawyers Edition 1110 (1892) the Court stated:

"It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal proceeding against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled to acting as a witness in any investigation that would give testimony which might tend to show that he himself committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

The Court continued:

"In June, 1807, Chief Justice Marshall, in the Circuit Court of the United States for the District of

Virginia, in Burr's trial (1 Burr's Trial 244), on the question whether the witness was privileged not to accuse himself, said: 'If the [39] question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath, that his answer would criminate himself, the Court can demand no other testimony of the fact . . . According to their statement' (The counsel for the United States) 'a witness can never refuse to answer any question, unless that answer unconnected with other testimony would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself; and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed [40] within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself, would most obviously be infringed by compelling a witness to disclose a fact of

this description. What testimony may be possessed, o
is obtainable, against any individual, the Court ca
never know. It would seem, then, that the Court ough
never to compel a witness to give an answer which dis
closes a fact that would form a necessary and essen
tial part of a crime which is punishable by the laws.

It is hard to imagine a more damaging link in the chai
in a prosecution under Vehicle Code Section 21750 tha
that which establishes that the defendant was driving th
vehicle involved. Yet this is the very information whic
the defendant is compelled to divulge under penalty o
being charged with a violation of Vehicle Code Sectio
20002.

The District Attorney has urged that "the State ma
forebid the activity altogether and, hence, may require a
a condition of the exercise of the privilege to use the high
ways of this State the reasonable requirement that perso
involved in accidents comply with Section 20002, Subdiv
sion A, of the Vehicle Code. This argument is answered b
the recent opinion in Bagley vs. Washinigton Townshi
Hospital District 65 A.C. 540.

> "Since no provision of constitutional or statuto
> law purports to give plaintiff a right to secure or [4
> retain employment by the Board, defendant urges tha
> his right to terminate her employment knows no leg
> limit.
>
> "Despite the antiquity of this argument, its reaso
> ing today stands utterly discredited. Although an i
> dividual can claim no constitutional right to obta
> public employment or to receive any other public
> conferred benefit (the use of the highways) the go

ernment cannot condition admission to such employment or receipt of such benefits upon any terms that it may choose to impose. As Professor Thomas Reed Powell long ago observed, 'Logically a thing which may be absolutely excluded is not the same as a thing which may be subjected to burdens of a different kind, even though such burdens would be regarded by all as less onerous than the burden of absolute exclusion. The 'power of absolute exclusion' is a term not identical with the 'power of relative exclusion' or the 'power to impose any burdens whatsoever' "

(Powell, The Right to Work for the State (1961), 16 Columbia Law Review 99, 111.)

"Today courts and commentators alike recognize without question that the power of government, Federal or State, to withhold benefits from its citizens does not encompass a supposed "lesser" power to grant such benefits upon an arbitrary deprivation of constitutional right."

"The faulty logic inherent in defendant's [42] proffered syllogism was rejected by this Court in Danskin vs. San Diego Unified School District (1946), 28 Cal. 2d 536. That case involved a school district which had undertaken to confine the use of its buildings to organizations whose members gave a satisfactory account of their views. In the course of that opinion we declare:

'The State is under no duty to make school buildings available for public meetings (Citations). If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. (Citations) Nor can it make the privilege of holding them dependent on conditions that would deprive any

members of the public of their constitutional rights. A State is without power to impose an unconstitutional requirement as a condition for granting a privilege, even though the privilege is the use of State property (Citations) ...'"

Subsequent to the Bagley case the United States Supreme Court also rejected this argument in an opinion filed January 16, 1967, in the case of Garrity vs. State of New Jersey. In that case the United States Supreme Court stated:

"There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price."

The Court thereafter indicates that the 14th Amendment prohibition against coerced confessions is such a right. [43] It is obvious, therefore, that a criminal culpability by reason of having been a driver of the vehicle involved under Count 1 of the Complaint in this case is enough of a risk that a confession made to avoid prosecution under Vehicle Code Section 20002 would not be admissible as being a coerced confession under the compulsion of the statute. It is clear, therefore, that the defendant had the right to not incriminate himself by acknowledging that he was the driver of the vehicle. In this connection see also Spevack vs. Klein, 35 L. W. 4140. Another interesting case is Hinchcliff vs. Clark, 230 F. Supp. 91, where the Court held that a taxpayer can refuse to supply information that would incriminate him. In United States vs. Silverstein, 314 Federal Reporter 789, 790, the Court held that an appearance before a Special Internal Revenue Agent is in the nature

of an appearance in a criminal investigation and that the claim of privilege against a summons directing production of an individual's papers was proper. If it is proper to withhold the information under the 5th Amendment privilege one can certainly not be prosecuted for so doing.

This Court has previously decided the problem before it in the case of People vs. James Mitchell, Mendocino County Action No. 3948-C. In that case the Court concluded that the provisions of Vehicle Code Section 20002 "cannot be constitutionally applied to the defendant under the circumstances of this case where he is charged with another offense resulting from the accident in question. It seems [44] clear that the statute attempts to require him to supply information which will complete the chain of circumstances necessary to convict him of the charge set forth in Count 1 of the Information. Even if we were to hold that the information supplied in compliance with those Vehicle Code sections could not be used in evidence against the defendant, the above cases indicate that this is not sufficient to preclude his assertion of the 5th Amendment. Any information supplied by him in compliance with those sections can certainly be used to develop other information, which could then be used to convict him of the charge set forth in Count 1. This is enough of a risk to authorize the defendant to assert the 5th Amendment and to, therefore, fail to comply with the provisions of Section 20002."

From the foregoing it follows that the Writ of Prohibition sought by the petitioner should be issued as prayed for.

Dated this 17th day of February, 1967.

s/ Robert L. Winslow
Judge [45]

Filed: February 24, 1967
Viola N. Richardson, County Clerk

The Superior Court of the State of California
for the County of Mendocino

No. 28366

Jonathan Todd Byers,
Petitioner,

vs.

The Justice Court for the Ukiah Judicial District, County of Mendocino, State of California,
Respondent.

ORDER OVERRULING DEMURRER

The demurrer in the above entitled matter came on regularly to be heard in Department 1 of the above-entitled Court at 8:30 a.m. on January 27, 1967, RAWLES, NELSON, GOLDEN & POULOS, by JOHN W. POULOS, ESQ. appeared as attorney for Petitioner and ARTHUR B. BROADDUS, District Attorney, by THOMAS B. SAWYER, Deputy District Attorney, appeared as attorney for Respondent. The matter having been fully argued and submitted to the Court for decision, and the Court having filed herein its written opinion on Friday, February 17, 1967, and good cause appearing therefore:

IT IS HEREBY ORDERED that said demurrer be, and the same hereby is, overruled.

Dated: February 24, 1967.

s/ Robert L. Winslow
Robert L. Winslow, Judge
of the Superior Court [46]

Filed: March 21, 1967
Viola N. Richardson, County Clerk

The Superior Court of the State of California
for the County of Mendocino

No. 28366

Jonathan Todd Byers,
Petitioner,

v.

The Justice Court for the Ukiah Judicial District, County of Mendocino, State of California,
Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter came on regularly for trial at 8:30 a.m. on January 27, 1967, in Department I of the above entitled Court, the Honorable Robert L. Winslow, Judge, presiding, without a jury, and was actually tried on said date.

RAWLES, NELSON, GOLDEN & POULOS by JOHN W. POULOS, ESQ. appeared as attorneys for Petitioner and ARTHUR B. BROADDUS, District Attorney, by THOMAS B. SAWYER, Deputy District Attorney, appeared as attorney for Respondent.

Pursuant to the stipulation of the parties, the above entitled matter was submitted to the Court upon the verified Petition on file herein and the demurrer of the Respondent, on file herein, together with certain stipulations entered into by the parties at said hearing, and the Court having

considered the evidence, and said cause having been submitted for decision, and the Court having filed its written opinion herein on February 17, 1967, in favor of Petitioner and against Respondent now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I

On August 22, 1966, a criminal complaint was issued and docketed in the Respondent Justice Court for the Ukiah [48] Judicial District, County of Mendocino, State of California, charging Petitioner JONATHAN TODD BYERS in Count I with a violation of Section 21750 of the California Vehicle Code and in Count II with a violation of Section 20002, Subdivision (a) of the Vehicle Code of the State of California. Said complaint was thereafter amended on its face to add the allegation that the offenses charged in Count I and Count II of said complaint were the same class of offense and connected together in their commission.

II

Count I of said complaint alleges:

> That said defendant did in the Ukiah Judicial District, County of Mendocino, State of California, on or about the 20th day of August, 1966, commit the crime of MISDEMEANOR, to-wit, violation of Section 21750 of the Vehicle Code of the State of California, in that said defendant did then and there while overtaking another vehicle proceeding in the same direction, fail to pass to the left at a safe distance as required by said Section of the Vehicle Code.

II

Count II of said complaint alleges:

> ... that said defendant did in the Ukiah Judicial Dis-

trict, County of Mendocino, State of California, on or about the 20th day of August [49] 1966, commit the crime of MISDEMEANOR, to-wit, violation of Subdivision (a) of Section 20002 of the Vehicle Code of the State of California, in that said defendant being then and there the driver of a vehicle involved in an accident resulting in injury to property did fail to immediately stop such vehicle at the scene of the accident, did fail to locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, did fail to leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and did without necessary delay, fail to notify the local headquarters of the Department of the California Highway Patrol.

IV

The alleged violation of Vehicle Code Section 21750 as alleged in Count I of said complaint resulted in an impact between the vehicle driven by the Petitioner and another vehicle which caused property damage and that the damage from this impact was the resulting injury to property alleged in Count II of said complaint. [50]

V

Petitioner was duly arrested on said charges contained in said complaint and held in the custody of the Sheriff of the County of Mendocino, State of California. Thereafter, and pursuant to Petitioner's request, The Honorable Hale McCowan, Jr., Judge of the Justice Court for the Ukiah

Judicial District, County of Mendocino, State of California, released Petitioner upon his own recognizance from the custody of the said Sheriff and Petitioner was at the time of the filing of the Petition herein, free on his own recognizance.

VI

Petitioner was duly arraigned in the said Justice Court and, within the time provided by law, Petitioner filed his written Demurrer to the complaint, and the charges set forth therein, attacking Vehicle Code Section 20002, Subdivision (a) as being unconstitutional, both upon its face and as applied to Petitioner in said complaint, upon the grounds that it violated the Petitioner's privilege against self-incrimination and his right to remain silent, secured to Petitioner by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section XIII of the California Constitution.

VII

Said Demurrer was argued and after said hearing the matter was taken under submission, and on December 7, 1966, the said Justice Court overruled said Demurrer and set the date for the arraignment of Petitioner for the purposes of entering a plea upon said charges contained in said Complaint for December 9, 1966. At the request of Petitioner, said Justice Court continued said arraignment until January 13, 1967, at the hour of 11:00 o'clock a.m.

VIII

On January 13, 1967, at the hour of 9:30 o'clock a.m. Petitioner presented his verified Petition for Writ of Prohibition requesting an alternative Writ of Prohibition and an Order to Show Cause why a peremptory Writ of Prohibition should not issue and on said date and at said time,

an Alternative Writ of Prohibition issued, which Alternative Writ of Prohibition provided as follows:

> THEREFORE, you are commanded to desist and refrain from arraigning the petitioner for the entrance of a plea to Count II and from trying and taking any further proceedings whatsoever in connection with said Count II of the complaint now pending in the Justice Court for the Ukiah Judicial District, County of Mendocino, State of California, which said complaint is docketed in Volume 91, Page 186 of the records of said Court and assigned Case No. A40692, until further order of this Court, and to show cause, if any you have, before this Court at 8:30 a.m. on January 27, 1967, in Department I of the above entitled Court in the [52] Mendocino County Courthouse, Ukiah, County of Mendocino, State of California, or as soon thereafter as the matter can be heard, why you should not be absolutely restrained from arraigning the defendant for the purposes of entering a plea upon Count II and from trying and taking any further proceedings upon said Count II contained in that complaint docketed in Volume 91, Page 186 of the records of said Court and assigned Case No. A40692.

IX

Unless restrained and prohibited by order of this Court, the said Justice Court threatens to and will require Petitioner to enter a plea upon the charges contained in Court II of said complaint and said Justice Court will pass upon, hear and try said charges.

X

Petitioner is the party having beneficial interest in this proceeding.

XI

No prior application for the Writ sought herein or any other writ pertaining to this matter has been made by the Petitioner herein.

XII

In the event any fact herein found shall be deemed or considered a conclusion of law, ti shall then be incorporated [53] in and become a part of the Conclusions of Law hereinafter made.

And from the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

I

Petitioner has no plain, speedy and adequate remedy in the ordinary course of the law.

II

The said Justice Court is wholly without jurisdiction and is acting in excess of its jurisdiction, to proceed to arraign and try the Petitioner on the charges alleged in Court II of said complaint, to-wit, an alleged violation of Section 20002, Subdivision (a) of the Vehicle Code of the State of California, in that under the facts hereinabove found, said Section, 20002, Subdivision (a) violates Petitioner's privilege against self-incrimination secured to him by the Fifth Amendment to the United States Constitution as made applicable to the State of California by the Fourteenth Amendment to the United States Constitution.

III

Petitioner is emtitled to a permanent Writ of Prohibition commanding Respondent Justice Court for the Ukiah Judicial District, County of Mendocino, State of California, to absolutely and permanently desist and refrain from ar-

raigning the Petitioner for the purposes of entering a plea upon the charges contained in Count II of said complaint and from hearing, trying and taking any further proceedings whatsoever on the allegations and charges contained in Count II of said complaint.

IV

In the event any Conclusion herein made shall be deemed or considered a Finding of Fact, it shall then be incorporated in and become a part of the Findings of Fact hereinabove made.

Dated: March 21, 1967.

s/ Robert L. Winslow
Robert L. Winslow
Judge of the Superior Court [55]

Jungments Book 44 Page 309
Entered March 21, 1967
Filed: March 21, 1967
Viola N. Richardson, County Clerk

The Superior Court of the State of California for the County of Mendocino

No. 28366

Jonathan Todd Byers,
Petitioner,

vs.

The Justice Court for the Ukiah Judicial District, County of Mendocino, State of California,
Respondent.

JUDGMENT GRANTING PERMANENT WRIT OF PROHIBITION

This Court having issued an Alternative Writ of Prohibition and an Order to Show Cause in the above-entitled matter on January 13, 1967, and this matter having come on for hearing and trial on January 27, 1967, with RAWLES, NELSON, GOLDEN & POULOS by JOHN W. POULOS, ESQ. appearing as attorneys for Petitioner and ARTHUR B. BROADDUS, District Attorney, by THOMAS B. SAWYER, ESQ., Deputy District Attorney, appearing as attorney for Respondent, and the matter being submitted to the Court by stipulation of the parties upon the verified Complaint and Demurrer filed herein and the Court having considered the evidence and certain stipulations entered into at said trial, and the matter having been submitted to the Court for its decision and the Court hav-

ing filed its written Opinion herein and written Findings of Fact and Conclusions of Law having been made and filed, and it appearing that Petitioner has no plain, speedy or adequate remedy at law, and that a permanent Writ of Prohibition should issue, and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that a Permanent Writ of Prohibition be issued commanding Respondent, the Justice Court for the Ukiah Judicial District, Count of Mendocino, State of California, to absolutely and permanently desist and refrain from arraigning the Petitioner for the [56] entrance of a plea to the charges contained in Count II of that certain Complaint entitled, "In the Justice Court for the Ukiah Judicial District, County of Mendocino, State of California, The People of the State of California, Plaintiff vs. Jonathan Todd Byers, Defendant," which said Complaint was docketed in Volume 91, Page 186 of the records of said Court and assigned Case No. A40692 and further commanding said Respondent to absolutely and permanently desist and refrain from hearing, trying any further proceedings whatsoever on the charges and allegations contained in Count II of said Complaint.

Dated: March 21, 1967.

s/ Robert L. Winslow
Robert L. Winslow
Judge of the Superior Court [57]

(Declaration of Service Omitted in Printing)

Filed: March 22, 1967
Viola N. Richardson, County Clerk

The Superior Court of the State of California
for the County of Mendocino

No. 28366

Jonathan Todd Byers,
Petitioner,

v.

The Justice Court for the Ukiah Judicial District, County of Mendocino, State of California,
Respondent.

NOTICE OF ENTRY OF JUDGMENT

TAKE NOTICE that on March 21, 1967, Judgment was entered in the above-entitled action in favor of Petitioner and against Respondent.

Dated: March 21, 1967.

RAWLES, NELSON, GOLDEN & POULOS
By s/ JOHN W. POULOS
John W. Poulos
Attorneys for Petitioner [58]

(Declaration of Service Omitted)

Filed: March 22, 1967
Viola N. Richardson, County Clerk

The Superior Court of the State of California
County of Mendocino

No. 28366

Jonathan Todd Byers,
Petitioner,

v.

The Justice Court for the Ukiah Judicial District, County of Mendocino, State of California,
Respondent.

NOTICE OF APPEAL

The Justice Court for the Ukiah Judicial District, County of Mendocino, State of California, Defendant-Respondent, appeals to the District Court of Appeal of the State of California, First Appellate District, from the Judgment.

DATED: March 22, 1967.

s/ ARTHUR B. BROADDUS
Arthur B. Broaddus
District Attorney of Mendocino
County and Attorney
for Appellant. [59]

Filed Sep 16 1969
William I. Sullivan, Clerk

In the Supreme Court of the State of California
In Bank

S. F. 22634

Jonathan Todd Byers,
Plaintiff and Respondent,
v.
The Justice Court for the Ukiah Judicial District of Mendocino County,
Defendant and Respondent;
The People,
Real Party in Interest and Appellant.

The People appeal from a judgment of the Superior Court of Mendocino County granting a writ of prohibition restraining the Justice Court for the Ukiah Judicial District from proceeding further against plaintiff Jonathan Todd Byers on count two of a criminal complaint filed in the justice court against him. Count one of the complaint charged Byers with improper and unsafe passing in violation of section 21750 of the Vehicle Code,[1] and [1*] count two charged him with violating one of the "hit-and-run" provisions in the Vehicle Code, section 20002, subdivision (a),[2] by leaving the scene of an automobile accident result-

1. Section 21750 provides: "The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe operation of the overtaken vehicle, subject to the limitations and exceptions hereinafter stated."

2. At the time of the accident section 20002, subdivision (a), provided: "The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immedi-

*Page numbering appearing at foot of page of original certified opinion.

ing in property damage without furnishing his identity and certain other information to the owner or person in charge of the damaged property.

Byers demurred to count two on the ground that section 20002, subdivision (a), was unconstitutional as applied because it violated his privilege against self-incrimination. It was stipulated by counsel that the two alleged Vehicle Code violations arose out of the same [2] occurrence, i.e., that the alleged improper passing caused the accident from which Byers assertedly departed without providing statutorily required information. The justice court overruled the demurrer.

Upon application by Byers the superior court granted a writ of prohibition restraining further proceedings on count two on the ground that section 20002, subdivision (a), could not be applied against Byers under the circumstances of the case without infringing his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment privilege against self-incrimination—a protection against state as well as federal govern-

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ately stop the vehicle at the scene of the accident and shall then and there either: (1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, or; (2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol. Any person failing to stop or to comply with said requirements under such circumstances is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not to exceed six months or by a fine of not to exceed five hundred dollars ($500) or by both."

In 1967 this section was amended in several minor respects not pertinent to this case.

mental action (Malloy v. Hogan, 378 U.S. 1)—ordinarily provides a defense to prosecution for failure to supply statutorily required information in cases where the defendant has reasonable ground to apprehend a substantial danger that such information, if supplied, would be available to prosecuting authorities and could be used as a significant "'link in a chain'" of evidence tending to establish his guilt of some criminal offense. (Marchetti v. United States, 390 U.S. 39, 48; Grosso v. United States, 390 U.S. 62, 66-67; Haynes v. United [3] States, 390 U.S. 85, 95-97, 101; Albertson v. SACB, 382 U.S. 70, 77-79, 81.)

The crucial inquiry in determining the applicability of the privilege to a statutory disclosure-of-information requirement is whether the individual seeking to avoid disclosure faces "substantial hazards of self-incrimination" because in his particular case there is a substantial likelihood that information disclosed by him in compliance with the statute could by itself or in conjunction with other evidence be used to secure his conviction of a criminal offense. (Marchetti v. United States, *supra*, 390 U.S. 39, 61.)

In *Marchetti, Grosso, Haynes,* and *Albertson,* the registration statutes with which petitioners failed to comply required a "highly selective group" of persons "inherently suspect" of criminal activity (Albertson v. SACB, *supra*, 382 U.S. 70, 79) to disclose information concerning acts or activities which were either clearly illegal under federal law (as in *Albertson)* or very likely illegal under federal or state law. However, in each case the crime-directed character of the registration requirement was viewed as important only insofar as it supported the claims of the specific petitioners that they faced "substantial hazards of

self-incrimination" justifying invocation of the privilege.

In *Marchetti* the court specifically recognized that there might be circumstances in which a person subject to the registration requirements of the federal wagering tax could not demonstrate that compliance would create for [4] him "substantial hazards of self-incrimination" so as to warrant his invocation of the privilege. (Marchetti v. United States, *supra,* 390 U.S. 39, 61; compare Haynes v. United States, *supra,* 390 U.S. 85, 97; Grosso v. United States, *supra,* 390 U.S. 62, 64.)[3]

Four Court of Appeal cases have considered whether the privilege against self-incrimination precludes prosecution under "hit-and-run" statutes. In the early case of People v. Diller, 24 Cal. App. 799, the court rejected the argument that the "hit-and-run" statute there in issue [5] was inher-

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3. The court in Marchetti noted that "Wagering and its ancillary activities are very widely prohibited under both federal and state law." (390 U.S. at p. 44.) However, the court discussed in detail the state laws prohibiting gambling and wagering in Connecticut, the state where petitioner allegedly conducted his wagering activities, before concluding that "Every aspect of petitioner's wagering activities . . . subjected him to possible state or federal prosecution" (*id.* at p. 47) and that "In these circumstances, it can scarcely be denied that the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable' ... hazards of self-incrimination" (*id.* at p. 48).

In *Grosso* the court also referred to "the various state and federal penalties which have been imposed upon wagering" but pointed out specifically that "Pennsylvania, in which petitioner allegedly accepted wagers, has adopted a comprehensive statutory system for the punishment of gambling and ancillary activities" in concluding that Grosso was entitled to invoke the privilege. (390 U.S. 62, 64.)

It is possible that certain persons engaged in wagering in Nevada, where only "lotteries and certain other wagering activities taxable under [the federal wagering tax]" are prohibited (Marchetti v. United States, *supra,* 390 U.S. at pp. 45-46), are not privileged to refrain from complying with the provisions of the federal wagering tax.

ently in conflict with the then-controlling state constitutional prohibition against self-incrimination. There was no evidence to show that had the defendant driver complied with the statute he might have incriminated himself, and the court expressly left open the question whether the privilege could be asserted in a case where there was a showing that, because of the particular facts surrounding the "hit-and-run" accident, the defendant might reasonably have feared that the disclosure of information required by the statute would tend to incriminate him.[4] *Diller* was [6] followed in People v. Fodera, 33 Cal. App. 8.

In People v. Limon, 252 Cal. App. 2d 575, a defendant convicted of a "hit-and-run" violation (Pen. Code, § 20001 [covering accidents involving personal injury] established that prior to the accident he had been drinking rather

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4. Two leading decisions by courts in other states have similarly upheld the essential validity of "hit-and-run" statutes against claims that they were inherently in conflict with state constitutional prohibitions against compulsory self-incrimination while leaving open the question whether in certain narrow circumstances a claim of privilege would excuse noncompliance with such statutes. (Commonwealth v. Joyce (1951) 326 Mass. 751, 756 [97 N.E. 2d 192]; Ex Parte Kneedler (1912) 243 Mo. 632, 640 [147 S.W. 983].)

It would appear that the recent decision of the Supreme Court of Illinois in People v. Lucus (1968) ___ Ill. 2d ___ [243 N.E. 2d 228], construing the federal constitutional privilege, follows the same approach as *Diller* and the cases cited above. The court stated: "Using the standard of Marchetti v. United States . . . the [Illinois "hit-and-run"] statute's provisions do not present a substantial and real hazard of [self-]incrimination." (243 N.E. 2d at p. 231.) The court did not expresly leave open the question whether the federal privilege would ever excuse noncompliance with a "hit-and-run" statute, but the statement of facts indicates that this question was implicitly left open. The appellant in *Lucus* was neither convicted of nor charged with any other offense in connection with the accident which gave rise to his statutory duty to identify himself. Nor is there any indication that any such charge would have been warranted. In other words, there was no showing that the appellant had any basis for a reasonable fear that compliance with the "hit-and-run" statute would lead to self-incrimination.

freely, and he claimed that the "hit-and-run" statute was unconstitutional as applied to him because by stopping and identifying himself as required by the statute he might have incriminated himself with regard to a possible charge of driving under the influence of liquor. Although the defendant thus alleged the sort of specific fear of self-incrimination carefully distinguished in *Diller*, the court disposed of defendant's claim merely by citing Diller for the proposition that the "validity of the statute was established long ago." (252 Cal. App. 2d at p. 579.)

The later case of People v. Bammes, 265 A.C.A. 713, 722-723, rejected the claim of privilege by a defendant [7] who was convicted of "hit-and-run" and charged with but acquitted of vehicluar manslaughter in connection with the accident furnishing the basis of the "hit-and-run" conviction. The court sought to distinguish the cases of *Marchetti, Grosso,* and *Haynes* on the ground that the statutes there involved were directed almost exclusively against a highly selective group of individuals inherently suspect of criminal activities whereas the "hit-and-run" statutes do not require the driver to admit involvement in the accident but only to identify himself as a driver of a vehicle "which was at or near the scene of the accident when it occurred." (*Id.* at p. 723.)

The court in *Bammes* inaccurately characterized the "hit-and-run" statute involved in that case (Veh. Code, § 20001), a statute similar in all relevant particulars to the statute involved in the present case; it also inaccurately distinguished *Marchetti, Grosso,* and *Haynes* from the case before it. First, although it is true that neither section 20001 nor section 20002 explicitly requires drivers involved in accidents to identify themselves *as* involved drivers, neither

can fairly be read to require only that an involved driver identify himself as merely having been "at or near the scene of the accident when it occurred." Even if these statutes could [8] be so read, it seems clear that in almost all circumstances it would be obvious to the person to whom the identification was made that the person supplying identification was a driver involved in the accident.

Second, although not all drivers involved in accidents are lawbreakers, there is a substantial correlation between being a driver involved in an accident and being a driver who has contemporaneously violated one or more vehicle laws.

"Hit-and-run" cases should be contrasted with Shapiro v. United States, 335 U.S. 1, where the statute involved was directed at a class of individuals not ordinarily suspect of criminal activities, namely, dealers in commodities. The court there held that no violation of the privilege against self-incrimination was involved in a prosecution based in part on information contained in records required to be kept for price regulation purposes where the records were of a kind customarily kept by such persons and where the required records had assumed "public aspects" which rendered them at least analogous to public documents.

Although the group subject to "hit-and-run" statutes, drivers involved in accidents, is not inherently suspect of criminal activities to the same extent [9] as the groups regulated by the statutes in *Marchetti, Grosso,* and *Haynes,* there is in the accident cases, unlike the situation in *Shapiro,* a substantial shadow of suspicion cast upon the persons regulated by the statute. Where circumstances in addition to membership in a suspect group regulated by a disclosure statute show that compliance with the statute

would involve self-incrimination, the rules set forth in *Marchetti, Grosso,* and *Haynes,* are applicable.

Decisions of the United States Supreme Court make clear that the privilege against self-incrimination is a personal one, and that whether the government may require a disclosure depends upon the facts of each case. Invocation of the privilege is not limited to situations in which the *purpose* of the inquiry is to get an incriminating answer. It is the *effect* of the answer that is determinative. "To sustain [a claim of] privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." (Hoffman v. United States, 341 U.S. 479, 486-487; see Mansfield, *The Albertson Case: Conflict* [10] *Between the Privilege Against Self-Incrimination and the Government's Need for Information,* 166 Sup. Ct. Rev. 103, 147-148.)

Nor is invocation of the privilege limited to situations in which the information requested would, without more, support a criminal conviction. "The privilege . . . not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . ." (*Id.* at p. 486; accord, Marchetti v. United States, *supra,* 390 U.S. 39, 48; Albertson v. SACB, *supra,* 382 U.S. 70, 78; Malloy v. Hogan, *supra,* 378 U.S. 1, 11-12; see McCormick, Evidence (1954) § 129, p. 271.) For example, in *Albertson* the court held that orders compelling petitioners to complete and file form IS-52 (which sought disclosure from members of "Communist-action organizations" of the name of the organization, place and date of

birth, and a list of offices held in the organization and duties thereof) violated the privilege because a response to any of the questions "might be used as evidence in or at least supply investigatory leads to a criminal prosecution." (382 U.S. at p. 78.) [11]

We are satisfied that the privilege is applicable when a driver of a motor vehicle involved in an accident is confronted with a statutory requirement to stop and divulge his identity and reasonably believes that compliance with the statute will result in self-incrimination. (See Mansfield, *supra,* 1966 Sup. Ct. Rev. 103, 121-122; McCormick, *supra,* § 134, pp. 283-284;[5] cf. Rembrandt v. City of Cleveland (Ohio App. 1927) 161 N.E. 364 [ordinance requiring drivers involved in accidents to make full report to police].) "That [the driver's] operation of a motor vehicle was causally related to an injury to person or property or to a particular incident on the highway may be crucial in a subsequent criminal prosecution. From other information it may be clear that whoever was driving a given vehicle was guilty [12] of a crime, and the only question is whether the defendant was the operator of that vehicle." (Mansfield, *supra,* 1966 Sup. Ct. Rev. 103, at p. 122.)

It does not matter, as the People appear to contend, that in some "hit-and-run" situations prosecuting authorities may be able to establish the driver's identity beyond a rea-

5. McCormick asserts that "When . . . the circumstances indicate reckless or wanton conduct by the person compelled to [comply with a "hit-and-run" statute] the required statement identifying himself as a person involved clearly meets the accepted test of incrimination, that is, the existence of substantial danger that the required statement will furnish evidence of an essential element of a crime." (P. 283.) However, MsCormick feels that since a "hit-and-run" statute is a reasonable police power regulation the privilege must yield "to the extent necessary to make effective this power of protecting safety on the highways." (P. 284.)

sonable doubt from other evidence such as eyewitness identification of the driver, his vehicle, or its license plate. "[T]he basic purposes that lie behind the privilege against self-incrimination . . . relate . . . to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'" (Tehan v. Shott, 382 U.S. 406, 415.) "Governments, state and federal, are . . . constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." (*Id.* at p. 414.)

The People urge that the privilege may not be asserted as a defense to compliance with section 20002 of the Penal Code because the state may regulate the use of its highways and the operation of motor vehicles by conditioning participation in these activities on compliance with section 20002 and other "hit-and-run" [13] statutes even in cases where this entails a forced waiver of the constitutional privilege against self-incrimination. (See generally, Note, *Required Information and the Privilege Against Self-Incrimination,* 65 Colum. L. Rev. 681, 686-687.) This theory, employed in a number of state court decisions prior to Malloy v. Hogan, *supra,* 378 U.S. 1, to reject claims that "hit-and-run" statutes violated state constitutional prohibitions against compulsory self-incrimination (e.g., State v. Razey (1929) 129 Kan. 328, 282 Pac. 755; People v. Rosenheimer, 209 N.Y. 115; see People v. Diller, *supra,* 24 Cal. App. 799) is untenable.

In Bagley v. Washington Township Hospital Dist., 65 Cal. 2d 499, 503-507, we held that the state may not condition the enjoyment of some benefit or privilege on the nonassertion of a constitutional right where "the utility of

imposing the conditions [does not] manifestly outweigh any resulting impairment of constitutional rights." As will be demonstrated hereinafter, the objective underlying section 20002 of the Vehicle Code can be achieved by a means unoffensive to the privilege against self-incrimination.

Since compliance with section 20002 of the Vehicle [14] Code may require disclosures coming within the privilege against self-incrimination and since the purpose of that section is to protect property owners from financial loss by requiring drivers involved in accidents resulting in property damage to disclose their identities (People v. Stansberry, 242 Cal. App. 2d 199, 203; Miglierini v. Havemann, 240 Cal. App. 2d 570, 573), the present case exemplifies a conflict much discussed by commentators in recent years, the conflict between the individual's right to protection under the Fifth Amendment privilege against self-incrimination and the government's substantial interest in having citizens report or otherwise divulge information to effectuate various regulatory measures designed to promote the public welfare. (See, e.g., Mansfield, *supra*, 1966 Sup. Ct. Rev. 103; McKay, *Self-Incrimination and the New Privacy*, 1967 Sup. Ct. Rev. 193, 204-224, 228-232; Note, *supra*, 65 Colum. L. Rev. 681.)

Obviously, "it is imperative to effect an accommodation that will permit government to collect vitally needed information without impairing the purposes of the privilege." (McKay, *supra*, at p. 204.) Decisions of the United States Supreme Court suggest a form of accommodation which provides the appropriate resolution of the conflicting interests involved in the present case. In brief, these decisions [15] provide (1) that the state may require a person to disclose information otherwise subject to a claim of privi-

lege if in place of the protection conferred by the privilege there is substituted another protection, having the same scope and effect as the privilege, namely, immunity from use of the information or its fruits in connection with a criminal prosecution against the person; and (2) that, when consistent with both legislative intent and effective enforcement of the criminal laws, a court may hold that such immunity exists, and therefore that disclosure is required, despite the absence of any specific legislative grant of immunity.

In Ullmann v. United States, 350 U.S. 422, 438-439, the United States Supreme Court stated that the "sole concern" of the privilege is "with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts . . . .'" which such testimony may disclose and that "Once the reason for the privilege ceases, the privilege ceases." In Marchetti v. United States, *supra,* 390 U.S. 39, 58, the court reaffirmed the proposition that "the privilege against self-incrimination may not properly be asserted if other protection is granted which 'is so broad as to have the [16] same extent in scope and effect' as the privilege itself."

Recent decisions have made it clear that an individual raising a valid claim of privilege need not be given complete immunity from prosecution in order to be compelled to testify.[6] (Gardner v. Broderick, 392 U.S. 273, 276; Al-

6. Language in Counselman v. Hitchcock, 142 U.S. 547, 585 ["[N]o statute which leaves the party or witness subject to prosecution after he answers the criminating question . . . can have the effect of supplanting the privilege . . . . ."], justified until recently speculation that only complete immunity from prosecution for an offense revealed by information the disclosure of which is compelled would supplant the privilege. (See Mansfield, *supra,* 1966 Sup. Ct. Rev. 103, 164; McKay, *supra,* 1967 Sup. Ct. Rev. 193, 229-230.)

bertson v. SACB, *supra,* 382 U.S. 70, 79-81; Murphy v. Waterfront Comm., 378 U.S. 52, 79.) The rule is, as stated in *Gardner:* "Answers may be compelled regardless of the privilege if there is immunity from federal and state use *of the compelled testimony or its fruits* in connection with a criminal prosecution against the person testifying." (Italics added.)

This rule is the logical corollary of the rule that when information is the product of an involuntary disclosure secured in violation of the privilege the person disclosing the information is merely protected [17] from prosecution on the basis of such information and the fruits thereof and not from any and all prosecution for offenses to which the information relates. (E.g., Garrity v. New Jersey, 385 U.S. 493; Miranda v. Arizona, 384 U.S. 436, 479 [majority opinion], 500, 522 [dissenting opinions].)

Accordingly, if the disclosures compelled by section 20002 of the Vehicle Code and the fruits of such disclosures may not be used in a criminal prosecution relating to the accident, the requirements of the privilege against self-incrimination are met. There is no statute explicitly providing for evidentiary use restrictions for persons complying with section 20002, subdivision (a), in cases where such persons would otherwise have a valid claim of privilege. Therefore, we must consider whether such restrictions may properly be imposed by this court.

There is precedent for judicial imposition of appropriate restrictions on the use of statements in order to compel otherwise privileged testimony. In Murphy v. Waterfront Comm., *supra,* 378 U.S. 52, petitioners were subpoenaed to testify at a hearing conducted by the bistate Waterfront Commission of New York Harbor concerning a work stop-

page at certain piers. Although granted immunity from prosecution under the laws of the two states [18] whose criminal laws were potentially applicable, New York and New Jersey, petitioners refused to respond to questions on the ground that the answers might tend to incriminate them under federal law, to which the grant of immunity did not purport to extend. On certiorari, petitioners attacked a decision of the New Jersey Supreme Court upholding civil contempt judgments rendered against petitioners for their refusals to answer. The United States Supreme Court held that (1) "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him" and (2) "in order to implement this constitutional rule . . . the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. . . ." (*Id.* at p. 79.)

In Marchetti v. United States, *supra,* 390 U.S. 39, 58, the government urged the court to permit continued enforcement of the federal occupational tax on wagerers, including the registration provisions, by imposing restrictions from use of self-incriminating information employed in *Murphy.* The court recognized this suggestion [19] as "in principle an attractive and apparently practical resolution of the difficult problem before us." Since the court explicitly assumed that the principal purpose of the federal wagering tax was "the collection of revenue, and not the punishment of gamblers" (*id.* at p. 57) and recognized that the registration requirement was a regulatory requirement designed to assure collection of the tax, the "problem" before the court

was essentially the same problem presented in the present case, the accommodation of the individual's right to assert his privilege against self-incrimination and the government's interest in requiring the disclosure of information to effectuate a legitimate civil regulatory measure.

Although it recognized that the judicial-imposition-of-use-restriction approach was theoretically acceptable as a device for reconciling conflicting private and governmental interests, the court declined to use it in *Marchetti*. The court felt this approach was inappropriate in the circumstances of that case for two reasons: (1) The very terms of the wagering tax statute evidenced Congress' intent that information obtained from registration should be provided to interested prosecuting authorities, and the Internal Revenue Service evidently [20] consistently carried out this intention, so that "the imposition of use-restriction would directly preclude effectuation of a significant element of Congress' purposes in adopting the wagering taxes." (*Id.* at pp. 58-59) (2) Imposition of such restrictions would oblige state prosecuting authorities to establish in each case of alleged illegal wagering that their evidence was untainted by any connection with information divulged because of the wagering tax, so that the enforcement of state gambling laws might be seriously hampered. (*Id.*)[7]

7. In Grosso v. United States, *supra*, 390 U.S. 62, a companion case involving the federal excise tax on wagering, the court also declined to impose use-restrictions on information obtained as a consequence of payment of the tax. "[I]t would be inappropriate to impose such restrictions upon one portion of a statutory system, when we have concluded that it would be improper, for reasons discussed in *Marchetti*, to do so upon 'an integral part' [footnote omitted] of the same system." (390 U.S. at p. 69.) In Haynes v. United States, *supra*, 390 U.S. 85, a case involving a claim of privilege as a defense to failure to register a certain firearm as required by federal law, the court declined, "for reasons indicated in *Marchetti*, *supra*, and *Grosso*, *supra*, to impose [use-]restrictions...." (390 U.S. at p. 100.)

With regard to the second of these reasons, it must be conceded that one result of any statutory or judicial restriction on the use of compulsorily divulged information or its fruits in connection with a criminal prosecution against the person divulging the information is that in any such prosecution the government [21] must bear the burden of establishing that its evidence was untainted by any connection with the information divulged, i.e., that the evidence came from an independent source. (Marchetti v. United States, *supra,* 390 U.S. 39, 59, fn. 17.) If this fact alone were sufficient cause to reject the use-restriction approach, the United States Supreme Court would not have adopted it in Murphy v. Waterfront Comm., *supra,* 378 U.S. 52, 79, in solving a problem involving a state demand for information and a federal prosecutorial interest nor recognized it as "in principle an attractive and apparently practical" solution to the problem in Marchetti v. United States, *supra,* at p. 58, which involved a federal demand for information and both state and federal prosecutorial interests. Indeed, an excessive concern for the government's burden of showing that evidence used in a prosecution is untainted is inherently at odds with the Supreme Court's recently clarified basic position that immunity sufficient to justify compelling a disclosure otherwise privileged need not be complete immunity from prosecution.

The reason the Supreme Court pointed to the potential burden on state prosecuting authorities as one basis for rejecting the use-restriction approach in [22] *Machetti* was most likely the court's concern with a delicate problem of conflicting federal and state interests. In *Murphy,* in order to "accommodate the interests of the State and Federal Governments in *investigating and prosecuting crime*" the

court held that a state may compel a witness to give testimony which may be incriminating under federal law and that if it does so "the Federal Government [is] prohibited from making any . . . use of [such] compelled testimony and its fruits [in connection with a criminal prosecution against him]." (378 U.S. 52, 79, italics added.) This accommodation was consistent with the traditional notion that in our system of federalism the states and not the federal government have primacy in the field of law enforcement. In *Marchetti,* on the other hand, the imposition of use-restrictions on *state* prosecuting officials, as urged by the United States, would have involved putting a possibly considerable burden on state prosecuting authorities in order to serve a federal interest in obtaining information as an incident to a purported but dubious interest in raising revenue, information which the court felt Congress could secure by "other methods, entirely consistent with constitutional limitations. . . ." (390 U.S. at p. 60.) Thus, the [23] accommodation suggested by the federal authorities in *Marchetti* would have been consistent with neither the court's concern for federal-state comity nor with the rule prohibiting infringement of constitutional rights for an otherwise legitimate state purpose where that purpose could be accomplished by a less onerous means. (E.g., Aptheker v. Secretary of State, 378 U.S. 500, 512-513; Sherbert v. Verner, 374 U.S. 398, 407.)

In the present case, on the other hand, the imposition by this court of a restriction on the use by prosecuting authorities of information supplied in compliance with section 20002, subdivision (a), of the Vehicle Code is not only "in principle an attractive and apparently practical resolution of the difficult problem before us" (Marchetti v. United

States, *supra,* 390 U.S. 39, 58), but it will neither frustrate any apparent significant legislative purpose nor unduly hamper criminal prosecutions of drivers involved in accidents resulting in damage to the property of others.

The face of the statute does not disclose any legislative intent to use the required disclosure of information to facilitate prosecutors for possible criminal acts occurring in connection with automobile accidents involving property damage. If the driver can [24] locate the owner or person in charge of the property damaged he need only disclose to that individual his and the automobile owner's name and address; if he cannot locate such person, he must leave a written notice containing the same information and "a statement of the circumstances" surrounding the accident as well as "notify" local law enforcement officials, ostensibly to make sure that the owner or person in charge of the damaged property can contact the driver by consulting the written notice or, if it has been removed or destroyed, such officials.

Not only does the statute on its face fail to disclose any legislative concern with facilitating criminal prosecutions but the courts have consistently recognized that the purpose of the statute is to promote the satisfaction of civil liabilities arising from automobile accidents involving property damage by inducing all drivers involved in such accidents to identify themselves to the owners or persons in charge of any damaged property. (People v. Stansberry, *supra,* 242 Cal. App. 2d 199, 203; Miglierini v. Havemann, *supra,* 240 Cal. App. 2d 570, 573.) In short, in enacting section 20002 and its predecessor sections the Legislature was concerned only with protecting the interests of private parties who suffer loss as the result of property damage occurring in automobile accidents. [25]

Nor is section 20002 part of any larger legislative scheme to facilitate criminal prosecutions. Rather, it is related in coverage and intent to the financial responsibility law (Veh. Code, §§ 16000-16553)[8] the primary purpose of which is to protect persons who while lawfully using the public highways suffer financial loss as a result of another's negligent use of the highways. (Mission Ins. Co. v. Feldt, 62 Cal. 2d 97, 101; Interinsurance Exchange v. Ohio Cas. Ins. Co., 58 Cal. 2d 142, 153.)

Finally, it is instructive, in determining legislative intent, to consider an analogous field of legislation involving a similar conflict between requiring disclosures for noncriminal purposes and the privilege against self-incrimination. In the statutes requiring drivers involved in accidents resulting in personal injury or death to file accident reports, the Legislature has explicitly subordinated the state's prosecutorial interest to the interest [26] in obtaining the disclosure.[9]

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8. Section 16000 requires the driver of every vehicle involved in an accident resulting from the operation of a motor vehicle on the public highways and damaging the property of any one person in an amount exceeding $200 to report the accident to the Department of Motor Vehicles. With certain exceptions, every such driver must then demonstrate the financial ability to satisfy any judgment that may be recovered against him or the owner of the vehicle for damage to property or suffer a suspension of his driving privileges. (Veh. Code, §§ 16020, 16050-16060, 16080.)

9. Section 20012 of the Vehicle Code provides that "All required *accident reports* . . . shall be without *prejudice* to the individual so reporting and shall be for the *confidential use* of the Department of Motor Vehicles and the Department of the California Highway Patrol, except that the Department of the California Highway Patrol or the law enforcement agency to whom the accident was reported shall disclose the contents of the reports . . . to any person who may have a proper interest therein, including, but not limited to [various enumerated private parties possibly affected financially and/or legally by the accident], . . ." (Italics added.)

In the present case there is no problem of conflicting state and federal interests; it is the state which both demands disclosure of information in "hit-and-run" accidents and prosecutes those who commit criminal acts on the highways. Imposing use-restrictions in the present case merely involves this court in making a judgment, based on an assessment of probable legislative intent, that the Legislature would prefer to have the provisions of section 20002 of the Vehicle Code upheld even in cases involving possible criminal misconduct at the cost of some burden on prosecuting authorities in criminal cases arising out of or related to an accident covered by that section rather [27] than avoid that burden at the cost of significantly frustrating the important noncriminal objective of the legislation. Imposition of use-restrictions in the present case will not preclude the Legislature from overriding our decision if it wishes by simply enacting legislation declaring that information derived from disclosures required by section 20002, subdivision (a), *may* be used in criminal prosecutions, in which case the privilege could be claimed in appropriate situations.

There is another significant distinction between the circumstances in *Marchetti* and the circumstances in the present case. In *Marchetti* the imposition of use-restrictions on information obtained as a result of compliance with the federal wagering tax would have had a much more sweeping effect on state law enforcement than would the imposition of such restrictions here. It appears that most—per-

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Section 20013 provides that except to prove compliance or noncompliance with the requirement that an accident report be filed no accident report may be "used as evidence in any trial, civil or criminal, arising out of an accident, . . ."

haps almost all—violators of state criminal prohibitions against wagering and related activities are subject to the disclosure requirements of the federal wagering tax. (Marchetti v. United States, *supra*, 390 U.S. 39, 44-46, fns. 5-6.) Thus, the imposition of use-restrictions in order to permit Congress to compel all wagerers to comply with the wagering tax law would have meant that in almost all state prosecutions for wagering or related illegal activities the state would be forced, if the defendant proved [28] compliance with the federal law, to establish that its evidence was untainted. This situation might indeed seriously hamper such state prosecutions. By contrast, far from all criminal violations committed on the highways by drivers of motor vehicles involved property damage. The burden resulting from the imposition of use-restrictions in the latter situation will exist only in those instances where property damage occurs in the course or as a result of a criminal violation committed on the highways by a driver.

We conclude that criminal prosecutions of drivers involved in accidents will not be unduly hampered by rules that prosecuting authorities may not use information divulged as a result of compliance with section 20002, subdivision (a), of the Vehicle Code or the fruits of such information and that in prosecutions of individuals who have complied with that section the state must establish that its evidence is not the fruit of such information.

Since imposition in the present case of use-restrictions as described above will neither frustrate any apparent legislative purpose behind the enactment of section 20002 of the Vehicle Code nor unduly hamper criminal prosecutions of drivers involved in accidents; [29] and since the imposition of such restrictions will not preclude the state

Legislature from overriding our decision if it wishes, the reasons impelling the United States Supreme Court to reject the "attractive and apparently practical" suggestion of imposing restrictions in Marchetti v. United States, *supra*, 390 U.S. 39, 58, are absent in the present case, and we must, in order to fulfill our responsibility to protect the privilege against self-incrimination, hold that where compliance with section 20002 of the Vehicle Code would otherwise be excused by an assertion of the privilege, compliance is, as in other cases, mandatory and state prosecuting authorities are precluded from using the information disclosed as a result of compliance or its fruits in connection with any criminal prosecution related to the accident.

In the present case, the superior court correctly concluded that at the time of the accident, Byers had reasonable ground to apprehend that if he stopped to identify himself as required by section 20002 of the Vehicle Code he would confront a substantial hazard of self-incrimination. The court had before it the fact that Byers was charged with violating section 21750 of the Vehicle Code and the stipulation that the accident [30] giving rise to the obligation under section 20002 resulted from the alleged violation of section 21750.

Although the privilege against self-incrimination was applicable, the privilege does not furnish a defense to a charge of violation of section 20002 because the purpose of the privilege is satisfied by the rule we adopt today that prosecuting authorities are precluded from using information divulged in compliance with section 20002 and the fruits of such information in circumstances where the driver would otherwise be constitutionally privileged not to comply. Thus, the judgment granting the writ of pro-

hibition cannot be affirmed on the theory, employed by the superior court, that Byers was privileged to withhold the information required by section 20002.

However, it does not follow that the judgment must be reversed; we must determine whether, in light of the fact that we here announce a doctrine new to this state's jurisprudence, fairness dictates that Byers not be punished for his failure to comply with section 20002.

In Murphy v. Waterfront Comm., *supra,* 378 U.S. 52, 79-80, the United States Supreme Court reversed the petitioners' contempt convictions because although under the holding of the case they could be required to testify [31] in view of the court-declared restrictions on the use of their testimony in any federal prosecution, at the time they originally refused to answer they had a reasonable fear that their testimony could be used by federal authorities in a criminal prosecution. At the time they refused to answer, petitioners' claim of privilege was ineffective under then-controlling decisions. The court, in holding for the first time that the privilege was applicable and that it was satisfied by use-restrictions, felt that fairness required that petitioners be given the opportunity to avoid contempt convictions by answering the questions put to them in light of the new protection afforded them as a matter of constitutional right under the holding of the case.

In the present case, Byers is in a position substantially similar to that of petitioners in *Murphy.* Byers had a reasonable basis for fearing that compliance with the "hit-and-run" statute would produce incriminating evidence which could be used against him in a criminal prosecution. At the time of the accident, Byers' claim of privilege was not

supported by then-controlling decisions.[10] This court [32] now holds that the privilege against self-incrimination is applicable to such a case, as Byers urges, but we also establish today for the first time restrictions on the use of information disclosed in compliance with the "hit-and-run" statute, and on the basis of such restrictions, we hold that compliance with the statute is not excused by the existence of the privilege.

The differences between the position of the petitioners in *Murphy* and Byers in this respect are not material. Byers did not expressly claim the privilege when he left the scene of the accident, but if he had stopped to do so, he would in the light of existing law thereby have rendered nugatory any claim of privilege. Although in *Murphy* the court in vacating the contempt judgment provided that the petitioners would then be required to testify in the light of the new protection afforded them should the state authorities still wish to question them, in the instant case, it does not appear that any valid purpose would be served by requiring Byers to now comply with the "hit-and-run" statute. [33]

We conclude, on the basis of Murphy v. Waterfront Comm., *supra,* that it would be unfair to hold that although Byers correctly asserted that the Fifth Amendment privilege was applicable to the question of his compliance with

10. In this respect Byers is in a better position than the petitioners in *Murphy*. They were faced with clear decisions that the privilege was inapplicable, whether or not their statements would be incriminating in a subsequent federal prosecution; Malloy v. Hogan, *supra,* 378 U.S. 1, holding the federal constitutional privilege applicable to state proceedings, was a companion case of *Murphy*. At the time of the accident, the leading California decision, People v. Diller, *supra,* 24 Cal. App. 799, left open the possibility that in some cases the state constitutional privilege would excuse noncompliance with a "hit-and-run" statute.

the "hit-and-run" statute he should have complied because of use-restrictions which he could only have speculated might exist.

The judgment is affirmed.

PETERS, J.

WE CONCUR:

TRAYNOR, C.J.

TOBRINER, J.

MOSK, J.

SULLIVAN, J. [34]

DISSENTING OPINION BY BURKE, J.

I dissent. The majority opinion holds that the privilege against self-incrimination, though applicable to section 20002 of the Vehicle Code, does not furnish a defense to a charge of violation of that section since the privilege is satisfied by precluding prosecuting authorities from using information divulged in compliance therewith (opinion, p. 31). Nevertheless, the majority would affirm the judgment granting the writ of prohibition to Byers on the sole ground that "fairness dictates that Byers not be punished for his failure to comply with section 20002," relying upon *Murphy* v. *Waterfront Comm.*, 378 U.S. 52, 79-80 (opinion, p. 31). I do not believe that the rationale of *Murphy* should be applied to the instant case.

In *Murphy,* petitioners claimed the privilege and refused to testify at a state agency hearing on the ground that their testimony might tend to incriminate them under federal law. The court held that petitioners [1] could be compelled to answer the questions propounded to them, since the federal authorities would be prohibited from using their testimony or its fruits against them in any subsequent criminal proceeding. However, the court vacated the contempt judgment in order to afford petitioners an opportunity to testify and thereby purge themselves of contempt. The court noted that at the time petitioners refused to testify, they had a "reasonable fear, based on this Court's decision in *Feldman* v. *United States* . . . [322 U.S. 487], that the federal authorities might use the questions against them . . . ." (378 U.S. at p. 79.)

The result reached in *Murphy* appears defensible, as it not only gave petitioners, who had claimed the privilege under a "reasonable fear" of federal prosecution, on op-

portunity to purge themselves of contempt by furnishing the requested information, but also promoted the interests of the state in obtaining that information from them. However, *Murphy* should not be used to totally exculpate Byers from his violation of section 20002.

Unlike the petitioners in *Murphy,* Byers claimed no privilege when he violated section 20002—instead he simply left the scene of the accident without furnishing the required information. Nothing in the record suggests [2] that in so doing Byers intended to claim or exercise the privilege against self-incrimination under a reasonable fear of prosecution. As the majority opinion indicates, California decisions in existence at the time of the accident did not recognize the application of the privilege to "hit-and-run" cases. (Opinion, p. 32.)

Therefore, if Byers was unaware of the existence of the privilege and was not acting in reliance upon existing state law, how are the ends of justice met by excusing Byers from conduct which, as the majority hold, remains unlawful and unprivileged? I cannot see any element of unfairness in holding Byers fully responsible for the consequences of his deliberate violation of section 20002.

Moreover, unlike the result reached in *Murphy,* the majority holding promotes no corresponding governmental interest to balance a determination of leniency towards Byers, since obviously any offer by him to comply with the requirements of section 20002 would come several years too late. [3]

In my view, the judgment of the superior court granting a writ of prohibition was erroneous and should be reversed with appropriate instructions.

BURKE, J.

I CONCUR:

McCOMB, J. [4]

Order Due
October 16, 1969

ORDER DENYING REHEARING

S. F. No. 22634

In the Supreme Court of the State of California
In Bank

BYERS, Plaintiff and Respondent
v.
JUSTICE COURT FOR THE UKIAH JUDICIAL DISTRICT, ETC., Defendant and Respondent;
THE PEOPLE, Real Party in Interest and Appellant

Petition of Real Party in Interest and Appellant petition for rehearing DENIED.

McComb, J., and Burke, J., are of the opinion that the petition should be granted.

Filed—Oct 15 1969

William I. Sullivan, Clerk
By /s/ K. Hawkes
S. F. Deputy

/s/ Traynor
Chief Justice

Supreme Court of the United States

No. 1070 --- , *October Term, 19* 69

California,

Petitioner,

v.

Jonathan Todd Byers

ON CONSIDERATION of the motion of the respondent for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

April 20, 1970

Supreme Court of the United States

No. 1070, October Term, 19 69

California,

Petitioner,

v.

Jonathan Todd Byers

Order allowing certiorari. Filed April 20, 19 70.

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 13 1970
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

SPONSE NOT PRINTED

OCTOBER TERM, 1968

No. ~~1-0-70~~ Misc. 75

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

JONATHAN TODD BYERS,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

THOMAS C. LYNCH
Attorney General of the State of California

ALBERT W. HARRIS, JR.
Assistant Attorney General

LOUISE H. RENNE
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-1337

Attorneys for Petitioner

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ..... Misc. .....

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

JONATHAN TODD BYERS,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

The People of the State of California respectfully petition that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in this case on September 16, 1969.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California printed in Appendix A hereto, is reported at 71 A.C. 1083, 80 Cal. Rptr. 553 and 458 P.2d 465 (September 16, 1969).

JURISDICTION

The Supreme Court of the State of California entered judgment in this case on September 16, 1969. A timely petition for rehearing was filed on October 1, 1969. On October 15, 1969 the Order Denying Rehearing was filed. The jurisdiction of this Court is invoked under Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

1. Whether the requirement imposed by a "hit-run" statute that a driver involved in an accident resulting in property damage must stop and identify himself violates the Fifth Amendment privilege against self-incrimination.

2. Whether, in order to sustain the constitutionality of such a requirement, it is necessary to bar the use of such information or its fruits in connection with any criminal proceeding.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States and the provisions of section 20002(a), California Vehicle Code, are set forth in Appendix B hereto.

STATEMENT OF THE CASE

A. Lower State Court Proceedings.

On August 22, 1966, a two-count criminal complaint was filed in the Mendocino County Justice Court for the Ukiah Judicial District in California, charging respondent Jonathan Todd Byers with two misdemeanor violations of the California Vehicle Code. Count one of the complaint charged Byers with improper and unsafe driving in viola-

tion of section 21750 of the Vehicle Code.[1] Count two charged him with violating one of the "hit-run" provisions in the California Vehicle Code, section 20002(a) (failure to stop at the scene of an accident resulting in property damage) (CT 8-9, 48-50).[2]

Byers filed a demurrer to Count two of the complaint in the Ukiah Justice Court (CT 10-13), claiming, *inter alia*, that section 20002(a) was unconstitutional because it violated the privilege against self-incrimination guaranteed by both the federal and state constitutions. (CT 10-13, 2-3). It was stipulated by counsel that both charges contained in the complaint arose out of the occurrence of the same accident (CT 3, 34, 50). On December 7, 1966, the Justice Court overruled the demurrer to the complaint. (CT 3-4, 10-13, 51-52).

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1. Section 21750 provides: "The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe operation of the overtaken vehicle, subject to the limitations and exceptions hereinafter stated."

2. At the time of the accident section 20002, subdivision (a), provided: "The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either: (1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, or; (2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol. Any person failing to stop or to comply with said requirements under such circumstances is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not to exceed six months or by a fine of not to exceed five hundred dollars ($500) or by both."

In 1967 this section was amended in several minor respects not pertinent to this case.

References are to the "Clerk's Transcript on Appeal" filed with this Court and hereinafter designated "CT."

On January 13, 1967, a petition for writ of prohibition was filed by Byers in the Mendocino County Superior Court (CT 2-13, 16-21, 52-53). In the Superior Court Byers again urged that the privilege against self-incrimination barred his prosecution under Count two of the complaint. He contended that to require a defendant to comply with the "hit-run" provisions of section 20002(a) when he was also charged with another criminal offense arising from the same accident, required him to give evidence against himself contrary to constitutional protection. On February 17, 1967, the Superior Court issued an opinion in support of the writ of prohibition sought by Byers. The Superior Court held that the Fifth Amendment privilege against self-incrimination made applicable to the states by the Fourteenth Amendment barred the prosecution of Byers under Count two of the complaint (CT 34-35).

B. State Appellate Proceedings.

On March 22, 1967 the petitioners filed a notice of appeal in the California Court of Appeal (CT 59). The Court of Appeal reversed the decision of the Superior Court and held that enforcement of the "hit-run" statute against Byers was not barred.[3] In reaching that decision the Court of Appeal first held that the Fifth Amendment privilege against self-incrimination encompassed a statutory requirement that a driver of an automobile involved in an accident stop and identify himself in any case where he later was charged with a criminal offense growing out of the same accident. However, the Court further held that compliance with the statute could be constitutionally justified if admissions and/or statements made in compliance with the stat-

3. That opinion which is not reported in the permanent volumes of the Official California reports is nevertheless set forth at 265 A.C.A. 1031, 71 Cal. Rptr. 609 (1968).

ute were not later used in evidence. Accordingly, by adoption of a theory of use-restriction, the Court upheld enforcement of the statute.

Both the petitioners and the respondent filed a Petition for Hearing in the California Supreme Court, and on November 20, 1968, the Court granted a hearing in the matter. Following briefing and argument, the Supreme Court on September 16, 1969 issued its opinion affirming the decision of the Superior Court and holding that enforcement of the statute against Byers was barred. In reaching that decision, the Supreme Court held: (1) that the statutory requirements imposed by section 20002(a) violated the Fifth Amendment privilege against self-incrimination, but that: (2) the constitutionality of the statute could still be sustained if no use were made of the required information or its fruits in connection with any criminal prosecution against the person. The Court also held: (3) that since, at the time of the accident, Byers could not reasonably have anticipated that the Court would adopt a theory of use-restriction to protect against use of the required information in a criminal proceeding, "fairness" dictated that Byers should not be punished for his failure to comply with the statute. Accordingly, the Court held that prosecution on Count two of the complaint was barred.

In arriving at the first step of its decision, that the Fifth Amendment was violated by such statutory requirements, the Court stated that (A. 3):

> [1] The Fifth Amendment privilege against self-incrimination—a protection against state as well as federal governmental action (*Malloy* v. *Hogan*, 378 U.S. 1 [12 L.Ed.2d 653, 84 S.Ct. 1489])—ordinarily provides a defense to prosecution for failure to supply statutorily required information in cases where the defendant has reasonable ground to apprehend a sub-

stantial danger that such information, if supplied, would be available to prosecuting authorities and could be used as a significant " 'link in a chain' " of evidence tending to establish his guilt of some criminal offense. (*Marchetti* v. *United States,* 390 U.S. 39, 48 [19 L.Ed. 2d 889, 88 S.Ct. 697]; *Grosso* v. *United States,* 390 U.S. 62, 66-67 [19 L.Ed2d 906, 911, 88 S.Ct. 709]; *Haynes* v. *United States,* 390 U.S. 85, 95-97, 101 [19 L.Ed.2d 923, 931-932, 934, 88 S.Ct. 722]; *Albertson* v. *SACB,* 382 U.S. 70, 77-79, 81 [15 L.Ed.2d 165, 170-171, 172, 86 S.Ct. 194].)

[2] The crucial inquiry in determining the applicability of the privilege to a statutory disclosure-of-information requirement is whether the individual seeking to avoid disclosure faces "substantial hazards of self-incrimination" because in his particular case there is a substantial likelihood that information disclosed by him in compliance with the statute could by itself or in conjunction with other evidence be used to secure his conviction of a criminal offense. (*Marchetti* v. *United States, supra,* 390 U.S. 39, 61 [19 L.Ed. 2d 889, 905, 88 S.Ct. 697].)

The Court then considered decisions of this Court (A. 3-4):

In *Marchetti, Grosso, Haynes,* and *Albertson,* the registration statutes with which petitioners failed to comply required a "highly selective group" of persons "inherently suspect" of criminal activity (*Albertson* v. *SACB, supra,* 382 U.S. 70, 79 [15 L.Ed.2d 165, 171, 86 S.Ct. 194]) to disclose information concerning acts or activities which were either clearly illegal under federal law (as in *Albertson*) or very likely illegal under federal or state law. However, in each case the crime-directed character of the registration requirement was viewed as important only insofar as it supported the claims of the specific petitioners that they faced "substantial hazards of self-incrimination" justifying invocation of the privilege.

In *Marchetti* the court specifically recognized that there might be circumstances in which a person subject to the registration requirements of the federal wagering tax could not demonstrate that compliance would create for him "substantial hazards of self-incrimination" so as to warrant his invocation of the privilege. (*Marchetti* v. *United States, supra,* 390 U.S. 39, 61 [19 L.Ed2d 889, 905, 88 S.Ct. 697]; compare *Haynes* v. *United States, supra,* 390 U.S. 85, 97 [19 L.Ed.2d 923, 932, 88 S.Ct. 772]; *Grosso* v. *United States, supra,* 390 U.S. 62, 64 [19 L.Ed.2d 906, 909, 88 S.Ct. 709].)[3]

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3. The court in *Marchetti* noted that "Wagering and its ancillary activities are very widely prohibited under both federal and state law." (390 U.S. at p. 44 [19 L.Ed.2d at p. 895].) However, the court discussed in detail the state laws prohibiting gambling and wagering in Connecticut, the state where petitioner allegedly conducted his wagering activities, before concluding that "Every aspect of petitioner's wagering activities . . . subjected him to possible state or federal prosecution" (*id.* at p. 47 [19 L.Ed.2d at p. 897]) and that "In these circumstances, it can scarcely be denied that the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable' . . . hazards of self-incrimination" (*id.* at p. 48 [19 L.Ed.2d at p. 897].)

In *Grosso* the court also referred to "the various state and federal penalties which have been imposed upon wagering" but pointed out specifically that "Pennsylvania, in which petitioner allegedly accepted wagers, has adopted a comprehensive statutory system for the punishment of gambling and ancillary activities" in concluding that Grosso was entitled to invoke the privilege. (390 U.S. 62, 64 [19 L.Ed.2d 906, 909, 88 S.Ct. 709].)

It is possible that certain persons engaged in wagering in Nevada, where only "lotteries and certain other wagering activities taxable under [the federal wagering tax]" are prohibited (*Marchetti v. United States, supra,* 390 U.S. at pp. 45-46 [19 L.Ed.2d at p. 896]), are not privileged to refrain from complying with the provisions of the federal wagering tax.

After contrasting several California "hit-run" decisions with another case decided by this Court, *Shapiro v. United States,* 335 U.S. 1 (1948) wherein this Court held that no violation of the privilege was involved in a prosecution based in part upon records required to be kept for price regulation, the California Court stated (A. 7):

> Although the group subject to "hit-and-run" statutes, drivers involved in accidents, is not inherently suspect of criminal activities to the same extent as the groups regulated by the statutes in *Marchetti, Grosso, and Haynes,* there is in the accident cases, unlike the situation in *Shapiro,* a substantial shadow of suspicion cast upon the persons regulated by the statute. Where circumstances in addition to membership in a suspect group regulated by a disclosure statute show that compliance with the statute would involve self-incrimination, the rules set forth in *Marchetti, Grosso, and Haynes,* are inapplicable.

The Court then concluded that (A. 9):

> **[5a]** We are satisfied that the privilege is applicable when a driver of a motor vehicle involved in an accident is confronted with a statutory requirement to stop and divulge his identity and reasonably believes that compliance with the statute will result in self-incrimination. (See Mansfield, *supra,* 1966 Sup.Ct.Rev. 103, 121-122; McCormick, *supra,* § 134, pp. 283-284;[5] cf. *Rembrandt* v. *City of Cleveland* (1927) 28 Ohio App. 4 [161 N.E. 364] [ordinance requiring drivers

5. McCormick asserts that "When . . . the circumstances indicate reckless or wanton conduct by the person compelled to [comply with a "hit-and-run" statute] the required statement identifying himself as a person involved clearly meets the accepted test of incrimination, that is, the existence of substantial danger that the required statement will furnish evidence of an essential element of a crime." (P. 283.) However, McCormick feels that since a "hit-and-run" statute is a reasonable police power regulation the privilege must yield "to the extent necessary to make effective this power of protecting safety on the highways." (P. 284.)

involved in accidents to make full report to police].) "That [the driver's] operation of a motor vehicle was causally related to an injury to person or property or to a particular incident on the highway may be crucial in a subsequent criminal prosecution. From other information it may be clear that whoever was driving a given vehicle was guilty of a crime, and the only question is whether the defendant was the operator of that vehicle." (Mansfield, *supra*, 1966 Sup.Ct. Rev. 103, at p. 122.)

The Court also stated that (A. 9-10):

> It does not matter, as the People appear to contend, that in some "hit-and-run" situations prosecuting authorities may be able to establish the driver's identity beyond a reasonable doubt from other evidence such as eyewitness identification of the driver, his vehicle, or its license plate. "[T]he basic purposes that lie behind the privilege against self-incrimination . . . relate . . . to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.' " (*Tehan* v. *Shott*, 382 U.S. 406, 415 [15 L.Ed.2d 453, 86 S.Ct. 459].) "Governments, state and federal, are . . . constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." (*Id.* at p. 414 [15 L.Ed2d at p. 458].)

Finally, in the course of its decision, the Court rejected the argument that compliance with a "hit-run" statute could be justified as a reasonable regulation imposed as a condition for the use of the state's highways or the operation of motor vehicles (A. 10).

REASONS FOR GRANTING THE WRIT

There are several important legal and practical reasons for granting this petition for writ of certiorari. In most jurisdictions there are statutes which require motorists involved in an accident where property or personal injury has been sustained, to stop and identify themselves, or in some jurisdictions, to render such aid as is reasonable or necessary. 7 Am. Jur. 2d, Automobiles, § 246. While such statutes have been upheld in the past against claims of unconstitutionality,[4] the opinion of the California Supreme Court is one of the first to consider the question since this Court held the Fifth Amendment privilege to be applicable to the states in *Malloy* v. *Hogan*, 378 U.S. 1 (1964). Undoubtedly, therefore, the opinion of the California Supreme Court will be of considerable future importance in other jurisdictions. However, the California court has misinterpreted the scope of the Fifth Amendment privilege against self-incrimination insofar as the Court has held that the privilege is violated by a statutory requirement that the driver of a vehicle involved in an accident resulting in property damage must stop and identify himself.

Such a decision is not required by the decisions rendered by this Court. Moreover, it already appears that the decision of the California Court is in conflict with the some-

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4. [See, *e.g.*, People v. McCormick, 102 Cal. App. 2d Supp. 954 (1951); *Ex parte Kneedler*, 243 Mo. 632, 147 S.W. 983 (1912); *People v. Rosenheimer*, 209 N.Y. 115, 102 N.E. 530 (1913); *Commonwealth v. Joyce*, 97 N.E. 2d 192 (1951).] In the only other reported case of which we are aware in which a "hit-run" statute had been declared unconstitutional, the state court rested its decision on the ground that the particular statute involved required a full report concerning all details of the accident. *Rembrandt v. Cleveland*, 28 Ohio App. 4, 161 N.E. 364 (1927). In that case, however, the court specifically stated that a "hit-run" statute could be drafted which would be constitutional.

what earlier decision rendered by the Illinois Supreme Court in *People* v. *Lucas,* 41 Ill. 2d 370, 243 N.E. 2d 228 (1968). In the *Lucas* case, the Illinois Supreme Court held that "using the standard of *Marchetti* v. *United States,*" 390 U.S. 39 (1968), a statute which required the driver to disclose his name and address, the registration number of his vehicle and, upon proper request, his driver's license, did not "present a substantial and real hazard of incrimination." In Ftn. 4 of its opinion, the California Supreme Court attempted to distinguish the holding of *Lucas* by stating, *inter alia,* that *Lucas* was not convicted nor charged with any other offense arising in connection with the accident involved. However, the constitutionality of a requirement that one must stop and identify oneself, cannot turn upon the fact that a prosecutor later decides to charge the motorist with a separate criminal offense arising out of the accident.

In sum, the California Supreme Court has created an unwarranted extension of the Fifth Amendment privilege. Moreover, its decision has wider applicability to other types of reporting and registration statutes. In *Marchetti* v. *United States, supra,* at 58, this Court stated that a theory of use-restriction is "in principle an attractive and apparently practical resolution of the difficult problem before us." It is in accordance with such reasoning that the California legislature has accorded confidentiality to the substantive information contained in automobile accident reports which are required to be filed. See e.g., section 20012, California Vehicle Code. However, while laudable purposes are achieved by restricting the use of required information under some circumstances, such use-restriction is unnecessary in considering the minimal statutory requirement that a driver involved in an accident stop and identify himself.

ARGUMENT

The Fifth Amendment Privilege Against Self-Incrimination Is Not Violated by a Statutory Requirement That a Driver Involved in an Automobile Accident Stop and Identify Himself.

Section 20002(a) of the California Vehicle Code imposes alternative requirements upon a driver involved in an accident resulting in property damage. As noted by the California Supreme Court, if the driver can locate the owner or person in charge of the property damaged, he need only disclose to that individual his and the automobile owner's name and address. If he cannot locate that person, he must leave a written notice giving that same information and a "statement of the circumstances surrounding the accident and notify local law enforcement officials.

The constitutional arguments that might be considered in the case that arises when the driver or owner of the damaged property cannot be immediately located, need not be considered here. The California Court has made it clear that the Fifth Amendment privilege against self-incrimination extends to even the minimal duties imposed by section 20002(a), when an individual can be located, *i.e.*, that a driver involved in the accident must stop and give his name and address to the owner or person in charge of the property damaged. In holding that the mere giving of a name and address violates the Fifth Amendment privilege, the state court has created "an extravagant extension of the Fifth Amendment." *Holt* v. *United States*, 218 U.S. 245, 252-253 (1910); *United States* v. *Wade*, 388 U.S. 218 (1967). That is particularly true in a case such as the present one where the respondent never complied with the "hit-and-run" statute. Cf. *United States* v. *Toussie*, 410 F.2d 1156, 1159-1160, cert. granted, *Toussie* v. *United States*, 38 Law Week 3141 (1969).

The result reached by the state court is not demanded by the decisions of this Court. Being in an accident is not a

crime. Criminal fault may or may not be involved, and in proving criminal fault, the state shoulders a heavy burden. Indeed, when the driver or owner of the damaged property can be located, the state is not initially involved and may not be involved later.

In relying upon this Court's decisions in *Albertson, Marchetti, Grosso or Haynes,* the California Court misconceived the real thrust of those cases and extended the situations involved in those cases to an unwarranted holding. Those cases, involving as they did Communist Party registration, gambler and firearm statutes, were directed "unmistakably" to persons "inherently suspect of criminal activities" in areas "permeated with criminal statutes." See *e.g., Marchetti* v. *United States, supra,* at 702, 706; *Haynes* v. *United States, supra,* at 730. As the court noted in the *Marchetti* case, using the "metaphor" of the "link in the chain," the information provided there "would surely provide a *significant* (emphasis supplied) link in the chain of evidence tending to establish his guilt." (Footnotes omitted.) *Marchetti* v. *United States, supra.*

Registration with the government under such circumstances is totally different from giving one's name and address at the scene of an accident. This distinction was earlier recognized in California in the decision of *People* v. *McCormick,* 102 Cal.App.2d Supp. 954, 963-964, 228 P.2d 349, 355 (1951), a decision which reached the same result as *Albertson* in striking down a Communist Party registration statute.

In *United States* v. *Sullivan,* 274 U.S. 259 (1927), this Court held that the Fifth Amendment privilege against self-incrimination did not excuse the recipient of income derived from illicit traffic in liquor from filing an income tax return. In *Shapiro* v. *United States,* 335 U.S. 1 (1948), the Court held that neither an immunity statute nor the

Fifth Amendment privilege barred compliance with a subpoena issued for the production of records required to be kept by the Office of Price Regulation, even though such information was later used in a criminal prosecution. In both the *Shapiro* and *Sullivan* cases, as here, the statutes were neutral on their face, and their enforcement had overriding "public aspects" which the *Albertson-Marchetti-Grosso-Haynes* cases did not.

Indeed, the California Court failed to consider that the scope of the privilege does not coincide with the complex of values it seeks to protect, and that some of the values protected by the guarantee against self-incrimination may be affected to some extent by an enforced system of information gathering based upon individual participation. See *e.g., Schmerber v. California,* 384 U.S. 757, 762-763 (1966). When, however, the information sought is minimal in terms of incrimination, and has overriding public interest purposes, the privilege is not contravened.

Indeed, the unwarranted extension of the privilege is further made evident by the fact that in many motor vehicle cases, the prosecuting officials may be able to establish the driver's identity from other evidence, such as eyewitness identification of the driver, his vehicle, or license plate. Although the California Court has stated that this is a factor which "does not matter" in determining whether the risk created is substantial, this Court has recently indicated to the contrary in *Minor* v. *United States,* 38 Law Week 4019, Ftn. 3 (decided December 8, 1969), wherein the court sustained two convictions for selling narcotic drugs and marijuana without the written order forms required by law.

Finally, it may be noted that the California Court also erred when it rejected the argument that a requirement

of driver identification could be reasonably imposed as a condition of driving without violating the privilege or requiring the information to be immunized. Where entirely reasonable, such contentions may be upheld. *CF. Hess* v. *Pawloski*, 274 U.S. 352 (1927).

CONCLUSION

Since identification of oneself as the driver of a vehicle does not constitute self-incrimination, the California Supreme Court erroneously concluded that the Fifth Amendment privilege against self-incrimination is violated by such a statutory requirement. Accordingly, its holding that the use of such information or its fruits must be barred in any criminal proceeding was erroneous. We respectfully urge, therefore, that the writ of certiorari be granted.

DATED: January 12, 1969

THOMAS C. LYNCH
Attorney General of the State of California

ALBERT W. HARRIS, JR.
Assistant Attorney General

LOUISE H. RENNE
Deputy Attorney General

Attorneys for Petitioner

Appendix

In the Supreme Court of the State of California in Bank

S.F. 22634

Filed September 16, 1969
William I. Sullivan, Clerk

Jonathan Todd Byers,
Plaintiff and Respondent,
vs.
The Justice Court for the Ukiah Judicial District of Mendocino County,
Defendant and Respondent;
The People,
Real Party in Interest and Appellant.

The people appeal from a judgment of the Superior Court of Mendocino County granting a writ of prohibition restraining the Justice Court for the Ukiah Judicial District from proceeding further against plaintiff Jonathan Todd Byers on count two of a criminal complaint filed in the justice court against him. Count one of the complaint charged Byers with improper and unsafe passing in violation of section 21750 of the Vehicle Code,[1] and count two charged him with violating one of the "hit-and-run" pro-

1. Section 21750 provides: "The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe operation of the overtaken vehicle, subject to the limitations and exceptions hereinafter stated."

visions in the Vehicle Code, section 20002, subdivision (a),[2] by leaving the scene of an automobile accident resulting in property damage without furnishing his identity and certain other information to the owner or person in charge of the damaged property.

Byers demurred to count two on the ground that section 20002, subdivision (a), was unconstitutional as applied because it violated his privilege against self-incrimination. It was stpulated by counsel that the two alleged Vehicle Code violations arose out of the same occurrence, i.e., that the alleged improper passing caused the accident from which Byers assertedly departed without providing statutorily required information. The justice court overruled the demurrer.

Upon application by Byers the superior court granted a writ of prohibition restraining further proceedings on count two on the ground that section 20002, subdivision (a), could not be applied against Byers under the circumstances of the case without infringing his privilege against self-

2. At the time of the accident section 20002, subdivision (a), provided: "The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either: (1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, or; (2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol. Any person failing to stop or to comply with said requirements under such circumstances is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not to exceed six months or by a fine of not to exceed five hundred dollars ($500) or by both."
In 1967 this section was amended in several minor respects not pertinent to this case.

incrimination under the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment privilege against self-incrimination—a protection against state as well as federal governmental action (Malloy v. Hogan, 378 U.S. 1)—ordinarily provides a defense to prosecution for failure to supply statutorily required information in cases where the defendant has reasonable ground to apprehend a substantial danger that such information, if supplied, would be available to prosecuting authorities and could be used as a significant " 'link in a chain' " of evidence tending to establish his guilt of some criminal offense. (Marchetti v. United States, 390 U.S. 39, 48; Grosso v. United States, 390 U.S. 62, 66-67; Haynes v. United States, 390 U.S. 85, 95-97, 101; Albertson v. SACB, 382 U.S. 70, 77-79,81.)

The crucial inquiry in determining the applicability of the privilege to a statutory disclosure-of-information requirement is whether the individual seeeking to avoid disclosure faces "substantial hazards of self-incrimination" because in his particular case there is a substantial likelihood that information disclosed by him in compliance with the statute could by itself or in conjunction with other evidence be used to secure his conviction of a criminal offense. (Marchetti v. United States, *supra*, 390 U.S. 39, 61).

In *Marchetti, Grosso, Haynes,* and *Albertson,* the registration statutes with which petitioners failed to comply required a "highly selective group" of persons "inherently suspect" of criminal activity (Albertson v. SACB, *supra,* 382 U.S. 70, 79) to disclose information concerning acts or activities which were either clearly illegal under federal law (as in *Albertson*) or very likely illegal under federal or state law. However, in each case the crime-directed character of the registration requirement was viewed as

important only insofar as it supported the claims of the specific petitioners that they faced "substantial hazards of self-incrimination" justifying invocation of the privilege.

In *Marchetti* the court specifically recognized that there might be circumstances in which a person subject to the registration requirements of the federal wagering tax could not demonstrate that compliance would create for him "substantial hazards of self-incrimination" so as to warrant his invocation of the privilege. (Marchetti v. United States, *supra*, 390 U.S. 39, 61; compare Haynes v. United States, *supra*, 390 U.S. 85, 97; Grosso v. United States, *supra*, 390 U.S. 62, 64.)[3]

Four Court of Appeal cases have considered whether the privilege against self-incrimination precludes prosecution under "hit-and-run" statutes. In the early case of People v. Diller, 24 Cal.App. 799, the court rejected the argument that the "hit-and-run" statute there in issue was

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3. The court in Marchetti noted that "Wagering and its ancillary activities are very widely prohibited under both federal and state law." (390 U.S. at p. 44.) However, the court discussed in detail the state laws prohibiting gambling and wagering in Connecticut, the state where petitioner allegedly conducted his wagering activities, before concluding that "Every aspect of petitioner's wagering activities . . . subjected him to possible state or federal prosecution" (*id.* at p. 47) and that "In these circumstances, it can scarcely be denied that the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable' . . . hazards of self-incrimination" (*id.* at p. 48).

In *Grosso* the court also referred to "the various state and federal penalties which have been imposed upon wagering" but pointed out specifically that "Pennsylvania, in which petitioner allegedly accepted wagers, has adopted a comprehensive statutory system for the punishment of gambling and ancillary activities" in concluding that Grosso was entitled to invoke the privilege. (390 U.S. 62, 64.)

It is possible that certain persons engaged in wagering in Nevada, where only "lotteries and certain other wagering activities taxable under [the federal wagering tax]" are prohibited (Marchetti v. United States, *supra*, 390 U.S. at pp. 45-46), are not privileged to refrain from complying with the provisions of the federal wagering tax.

inherently in conflict with the then-controlling state constitutional prohibition against self-incrimination. There was no evdence to show that had the defendant driver complied with the statute he might have incriminated himself, and the court expressly left open the question whether the privilege could be asserted in a case where there was a showing that, because of the particular facts surrounding the "hit-and-run" accident, the defendant might reasonably have feared that the disclosure of information required by the statute would tend to incriminate him.[4] *Diller* was followed in People v. Fodera, 33 Cal.App. 8.

In People v. Limon, 252 Cal.App.2d 575, a defendant convicted of a "hit-and-run" violation (Pen. Code § 20001 [covering accidents involving personal injury]) established that prior to the accident he had been drinking rather

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4. Two leading decisions by courts in other states have similarly upheld the essential validity of "hit-and-run" statutes against claims that they were inherently in conflict with state constitutional prohibitions against compulsory self-incrimination while leaving open the question whether in certain narrow circumstances a claim of privilege would excuse noncompliance with such statutes. (Commonwealth v. Joyce (1951) 326 Mass. 751, 756 [97 N.E.2d 192]; Ex Parte Kneedler (1912) 243 Mo. 632, 640 [147 S.W. 983].)

It would appear that the recent decision of the Supreme Court of Illinois in People v. Lucus (1968 ..... Ill.2d ..... [243 N.E.2d 228], construing the federal constitutional privilege, follows the same approach as *Diller* and the cases cited above. The court stated: "Using the standard of Marchetti v. United States . . . the [Illinois "hit-and-run"] statute's provisions do not present a substantial and real hazard of [self-]incrimination." (243 N.E.2d at p. 231.) The court did not expressly leave open the question whether the federal privilege would ever excuse noncompliance with a "hit-and-run" statute, but the statement of facts indicates that this question was implicitly left open. The appellant in *Lucus* was neither convicted of nor charged with any other offense in connection with the accident which gave rise to his statutory duty to identify himself. Nor is there any indication that any such charge would have been warranted. In other words, there was no showing that the appellant had any basis for a reasonable fear that compliance with the "hit-and-run" statute would lead to self-incrimination.

freely, and he claimed that the "hit-and-run" statute was unconstitutional as applied to him because by stopping and identifying himself as required by the statute he might have incriminated himself with regard to a possible charge of driving under the influence of liquor. Although the defendant thus alleged the sort of specific fear of self-incrimination carefully distinguished in *Diller*, the court disposed of defendant's claim merely by citing *Diller* for the proposition that the "validity of the statute was established long ago." (252 Cal.App.2d at p. 579.)

The later case of People v. Bammes, 265 A.C.A. 713, 722-723, rejected the claim of privilege by a defendant who was convicted of "hit-and-run" and charged with but acquitted of vehicular manslaughter in connection with the accident furnishing the basis of the "hit-and-run" conviction. The court sought to distinguish the cases of *Marchetti, Grosso,* and *Haynes* on the ground that the statutes there involved were directed almost exclusively against a highly selective group of individuals inherently suspect of criminal activities whereas the "hit-and-run" statutes do not require the driver to admit involvement in the accident but only to identify himself as a driver of a vehicle "which was at or near the scene of the accident when it occurred." (*Id.* at p. 723.)

The court in *Bammes* inaccurately characterized the "hit-and-run" statute involved in that case (Veh. Code, § 20001), a statute similar in all relevant particulars to the statute involved in the present case; it also inaccurately distinguished *Marchetti, Grosso,* and *Haynes* from the case before it. First, although it is true that neither section 20001 nor section 20002 explicitly requires drivers involved in accidents to identify themselves *as* involved drivers, neither can fairly be read to require only that an involved driver

identify himself as merely having been "at or near the scene of the accident when it occurred." Even if these statutes could be so read, it seems clear that in almost all circumstances it would be obvious to the person to whom the identification was made that the person supplying identification was a driver involved in the accident.

Second, although not all drivers involved in accidents are lawbreakers, there is a substantial correlation between being a driver involved in an accident and being a driver who has contemporaenously violated one or more vehicle laws.

"Hit-and-run" cases should be contrasted with Shapiro v. United States, 335 U.S. 1, where the statute involved was directed at a class of individuals not ordinarily suspect of criminal activities, namely, dealers in commodities. The court there held that no violation of the privilege against self-incrimination was involved in a prosecution based in part on information contained in records required to be kept for price regulation purposes where the records were of a kind customarily kept by such persons and where the required records had assumed "public aspects" which rendered them at least analogous to public documents.

Although the group subject to "hit-and-run" statutes, drivers involved in accidents, is not inherently suspect of criminal activities to the same extent as the groups regulated by the statutes in *Marchetti, Grosso,* and *Haynes,* there is in the accident cases, unlike the situation in *Shapiro,* a substantial shadow of suspicion cast upon the persons regulated by the statute. Where circumstances in addition to membership in a suspect group regulated by a disclosure statute show that compliance with the statute would involve self-incrimination, the rules set forth in *Marchetti, Grosso,* and *Haynes,* are applicable.

Decisions of the United States Supreme Court make clear that the privilege against self-incrimination is a personal one, and that whether the government may require a disclosure depends upon the facts of each case. Invocation of the privilege is not limited to situations in which the *purpose* of the inquiry is to get an incriminating answer. It is the *effect* of the answer that is determinative. "To sustain [a claim of] privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." (Hoffman v. United States, 341 U.S. 479, 486-487; see Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information,* 166 Sup.Ct.Rev. 103, 147-148.)

Nor is invocation of the privilege limited to situations in which the information requested would, without more, support a criminal conviction. "The privilege . . . not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . ." (*Id.* at p. 486; accord, Marchetti v. United States, *supra,* 390 U.S. 39, 48; Albertson v. SACB, *supra,* 382 U.S. 70, 78; Malloy v. Hogan, *supra,* 378 U.S. 1, 11-12; see McCormick, Evidence (1954) § 129, p. 271.) For example, in *Albertson* the court held that orders compelling petitioners to complete and file form IS-52 (which sought disclosure from members of "Communist-action organizations" of the name of the organization, place and date of birth, and a list of offices held in the organization and duties thereof) violated the privilege because a response to any of the questions "might be used as evidence in or at least supply

investigatory leads to a criminal prosecution." (382 U.S. at p. 78.)

We are satisfied that the privilege is applicable when a driver of a motor vehicle involved in an accident is confronted with a statutory requirement to stop and divulge his identity and reasonably believes that compliance with the statute will result in self-incrimination. (See Mansfield, *supra,* 1966 Sup.Ct.Rev. 103, 121-122; McCormick, *supra,* § 134, pp. 283-284;[5] cf. Rembrandt v. City of Cleveland (Ohio App. 1927) 161 N.E. 364 [ordinance requiring drivers involved in accidents to make full report to police].) "That [the driver's] operation of a motor vehicle was casually related to an injury to person or property or to a particular incident on the highway may be crucial in a subsequent criminal prosecution. From other information it may be clear that whoever was driving a given vehicle was guilty of a crime, and the only question is whether the defendant was the operator of that vehicle." (Mansfield, *supra,* 1966 Sup.Ct.Rev. 103, at p. 122.)

It does not matter, as the People appear to contend, that in some "hit-and-run" situations prosecuting authorities may be able to establish the driver's identity beyond a reasonable doubt from other evidence such as eyewitness identification of the driver, his vehicle, or its license plate. "[T]he basic purposes that lie behind the privilege against self-incrimination . . . relate . . . to preserving the integrity

5. McCormick asserts that "When . . . the circumstances indicate reckless or wanton conduct by the person compelled to [comply with a "hit-and-run" statute] the required statement identifying himself as a person involved clearly meets the accepted test of incrimination, that is, the existence of substantial danger that the required statement will furnish evidence of an essential element of a crime." (P. 283.) However, McCormick feels that since a "hit-and-run" statute is a reasonable police power regulation the privilege must yield "to the extent necessary to make effective this power of protecting safety on the highways." (P. 284.)

of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'" (Tehan v. Shott, 382 U.S. 406, 415.) "Governments, state and federal, are . . . constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." (*Id.* at p. 414.)

The People urge that the privilege may not be asserted as a defense to compliance with section 20002 of the Penal Code because the state may regulate the use of its highways and the operation of motor vehicles by conditioning participation in these activities on compliance with section 20002 and other "ht-and-run" statutes even in cases where this entails a forced waiver of the constitutional privilege against self-incrimination. (See generally, Note, *Required Information and the Privilege Against Self-Incrimination*, 65 Colum.L.Rev. 681, 686-687.) This theory, employed in a number of state court decisions prior to Malloy v. Hogan, *supra*, 378 U.S. 1, to reject claims that "hit-and-run" statutes violated state constitutional prohibitions against compulsory self-incrimination (e.g., State v. Razey (1929) 129 Kan. 328, 282 Pac. 755; People v. Rosenheimer, 209 N.Y. 115; see People v. Diller, *supra*, 24 Cal.App. 799) is untenable.

In Bagley v. Washington Township Hospital Dist., 65 Cal.2d 499, 503-507, we held that the state may not condition the enjoyment of some benefit or privilege on the nonassertion of a constitutional right where "the utility of imposing the conditions [does not] manifestly outweigh any resulting impairment of constitutional rights." As will be demonstrated hereinafter, the objective underlying section 20002 of the Vehicle Code can be achieved by a means unoffensive to the privilege against self-incrimination.

Since compliance with section 20002 of the Vehicle Code may require disclosures coming within the privilege against self-incrimination and since the purpose of that section is to protect property owners from financial loss by requiring drivers involved in accidents resulting in property damage to disclose their identities (People v. Stansberry, 242 Cal.App.2d 199, 203; Miglierini v. Havemann, 240 Cal.App. 2d 570, 573), the present case exemplifies a conflict much discussed by commentators in recent years, the conflict between the individual's right to protection under the Fifth Amendment privilege against self-incrimination and the government's substantial interest in having citizens report or otherwise divulge information to effectuate various regulatory measures designed to promote the public welfare. (See, e.g., Mansfield, *supra,* 1966 Sup.Ct.Rev. 103; McKay, *Self-Incrimination and the New Privacy,* 1967 Sup.Ct.Rev. 193, 204-224, 228-232; Note, *supra,* 65 Colum.L.Rev. 681.)

Obviously, "it is imperative to effect an accommodation that will permit government to collect vitally needed information without impairing the purposes of the privilege." (McKay, *supra,* at p. 204.) Decisions of the United States Supreme Court suggest a form of accommodation which provides the appropriate resolution of the conflicting interests involved in the present case. In brief, these decisions provide (1) that the state may require a person to disclose information otherwise subject to a claim of privilege if in place of the protection conferred by the privilege there is substituted another protection, having the same scope and effect as the privilege, namely, immunity from use of the information or its fruits in connection with a criminal prosecution against the person; and (2) that, when consistent with both legislative intent and effective enforcement of the criminal laws, a court may hold that

such immunity exists, and therefore that disclosure is required, despite the absence of any specific legislative grant of immunity.

In Ullmann v. United States, 350 U.S. 422, 438-439, the United States Supreme Court stated that the "sole concern" of the privilege is "with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts . . . .'" which such testimony may disclose and that "Once the reason for the privilege ceases, the privilege ceases." In Marchetti v. United States, *supra*, 390 U.S. 39, 58, the court reaffirmed the proposition that "the privilege against self-incrimination may not properly be asserted if other protection is granted which 'is so broad as to have the same extent in scope and effect' as the privilege itself."

Recent decisions have made it clear that an individual raising a valid claim of privilege need not be given complete immunity from prosecution in order to be compelled to testify.[6] (Gardner v. Broderick, 392 U.S. 273, 276; Albertson v. SACB, *supra*, 382 U.S. 70, 79-81; Murphy v. Waterfront Comm., 378 U.S. 52, 79.) The rule is, as stated in *Gardner*: "Answers may be compelled regardless of the privilege if there is immunity from federal and state *use of the compelled testimony or its fruits* in connection with a criminal prosecution against the person testifying." (Italics added.)

This rule is the logical corollary of the rule that when information is the product of an involuntary disclosure

6. Language in Counselman v. Hitchcock, 142 U.S. 547, 585 ["[N]o statute which leaves the party or witness subject to prosecution after he answers the criminating question . . . can have the effect of supplanting the privilege . . . ."], justified until recently speculation that only complete immunity from prosecution for an offense revealed by information the disclosure of which is compelled would supplant the privilege. (See Mansfield, *supra*, 1966 Sup.Ct.Rev. 103, 164; McKay, *supra*, 1967 Sup.Ct.Rev. 193, 229-230.)

secured in violation of the privilege the person disclosing the information is merely protected from prosecution on the basis of such information and the fruits thereof and not from any and all prosecution for offenses to which the information relates. (E.g., Garrity v. New Jersey, 385 U.S. 493; Miranda v. Arizona, 384 U.S. 436, 479 [majority opinion], 500, 522 [dissenting opinions].)

Accordingly, if the disclosures compelled by section 20002 of the Vehicle Code and the fruits of such disclosures may not be used in a criminal prosecution relating to the accident, the requirements of the privilege against self-incrimination are met. There is no statute explicitly providing for evidentiary use restrictions for persons complying with section 20002, subdivision (a), in cases where such persons would otherwise have a valid claim of privilege. Therefore, we must consider whether such restrictions may properly be imposed by this court.

There is precedent for judicial imposition of appropriate restrictions on the use of statements in order to compel otherwise privileged testimony. In Murphy v. Waterfront Comm., *supra,* 378 U.S. 52, petitioners were subpoenaed to testify at a hearing conducted by the bistate Waterfront Commission of New York Harbor concerning a work stoppage at certain piers. Although granted immunity from prosecution under the laws of the two states whose criminal laws were potentially applicable, New York and New Jersey, petitioners refused to respond to questions on the ground that the answers might tend to incriminate them under federal law, to which the grant of immunity did not purport to extend. On certiorari, petitioners attacked a decision of the New Jersey Supreme Court upholding civil contempt judgments rendered against petitioners for their refusals to answer. The United States Supreme Court held that (1) "a

state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him" and (2) "in order to implement this constitutional rule . . . the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. . . ." (*Id.* at p. 79.)

In Marchetti v. United States, *supra,* 390 U.S. 39, 58, the government urged the court to permit continued enforcement of the federal occupational tax on wagerers, including the registration provisions, by imposing restrictions from use of self-incriminating information employed in *Murphy.* The court recognized this suggestion as "in principle an attractive and apparently practical resolution of the difficult problem before us." Since the court explicitly assumed that the principal purpose of the federal wagering tax was "the collection of revenue, and not the punishment of gamblers" (*Id.* at p. 57) and recognized that the registration requirement was a regulatory requirement designed to assure collection of the tax, the "problem" before the court was essentially the same problem presented in the present case, the accommodation of the individual's right to assert his privilege against self-incrimination and the government's interest in requiring the disclosure of information to effectuate a legitimate civil regulatory measure.

Although it recognized that the judicial-imposition-of-use-restriction approach was theoretically acceptable as a device for reconciling conflicting private and governmental interests, the court declined to use it in *Marchetti.* The court felt this approach was inappropriate in the circumstances of that case for two reasons: (1) The very terms of the wagering tax statute evidenced Congress' intent that information obtained from registration should be provided to

interested prosecuting authorities, and the Internal Revenue Service evidently consistently carried out this intention, so that "the imposition of use-restriction would directly preclude effectuation of a significant element of Congress' purposes in adopting the wagering taxes." (*Id.* at pp. 58-59.) (2) Imposition of such restrictions would oblige state prosecuting authorities to establish in each case of alleged illegal wagering that their evidence was untainted by any connection with information divulged because of the wagering tax, so that the enforcement of state gambling laws might be seriously hampered. (*Id.*)[7]

With regard to the second of these reasons, it must be conceded that one result of any statutory or judicial restriction on the use of compulsorily divulged information or its fruits in connection with a criminal prosecution against the person divulging the information is that in any such prosecution the government must bear the burden of establishing that its evidence was untainted by any connection with the information divulged, i.e., that the evidence came from an independent source. (Marchetti v. United States, *supra,* 390 U.S. 39, 59, fn. 17.) If this fact alone were sufficient cause to reject the use-restriction approach, the United States Supreme Court would not have adopted it in Murphy v. Waterfront Comm., *supra,* 378 U.S. 52, 79, in

7. In Grosso v. United States, *supra,* 390 U.S. 62, a companion case involving the federal excise tax on wagering, the court also declined to impose use-restrictions on information obtained as a consequence of payment of the tax. "[I]t would be inappropriate to impose such restrictions upon one portion of a statutory system, when we have concluded that it would be improper, for reasons discussed in *Marchetti,* to do so upon 'an integral part' [footnote omitted] of the same system." (390 U.S. at p. 69). In Haynes v. United States, *supra,* 390 U.S. 85, a case involving a claim of privilege as a defense to failure to register a certain firearm as required by federal law, the court declined, "for reasons indicated in *Marchetti, supra,* and *Grosso, supra,* to impose [use-]restrictions . . . ." (390 U.S. at p. 100.)

solving a problem involving a state demand for information and a federal prosecutorial interest nor recognized it as "in principle an attractive and apparently practical" solution to the problem in Marchetti v. United States, *supra*, at p. 58, which involved a federal demand for information and both state and federal prosecutorial interests. Indeed, an excessive concern for the government's burden of showing that evidence used in a prosecution is untainted is inherently at odds with the Supreme Court's recently clarified basic position that immunity sufficient to justify compelling a disclosure otherwise privileged need not be complete immunity from prosecution.

The reason the Supreme Court pointed to the potential burden on state prosecuting authorities as one basis for rejecting the use-restriction approach in *Marchetti* was most likely the court's concern with a delicate problem of conflicting federal and state interests. In *Murphy*, in order to "accommodate the interests of the State and Federal Governments in *investigating and prosecuting crime*" the court held that a state may compel a witness to give testimony which may be incriminating under federal law and that if it does so "the Federal Government [is] prohibited from making any . . . use of [such] compelled testimony and its fruits [in connection with a criminal prosecution against him]." (378 U.S. 52, 79, italics added.) This accommodation was consistent with the traditional notion that in our system of federalism the states and not the federal government have primacy in the field of law enforcement. In *Marchetti*, on the other hand, the imposition of use-restrictions on *state* prosecuting officials, as urged by the United States, would have involved putting a possibly considerable burden on state prosecuting authorities in order to serve a federal interest in obtaining information as an incident to a pur-

ported but dubious interest in raising revenue, information which the court felt Congress could secure by "other methods, entirely consistent with constitutional limitations. ..." (390 U.S. at p. 60.) Thus, the accommodation suggested by the federal authorities in *Marchetti* would have been consistent with neither the court's concern for federal-state comity nor with the rule prohibiting infringement of constitutional rights for an otherwise legitimate state purpose where that purpose could be accomplished by a less onerous means. (E.g., Aptheker v. Secretary of State, 378 U.S. 500, 512-513; Sherbert v. Verner, 374 U.S. 398, 407.)

In the present case, on the other hand, the imposition by this court of a restriction on the use by prosecuting authorities of information supplied in compliance with section 20002, subdivision (a), of the Vehicle Code is not only "in principle an attractive and apparently practical resolution of the difficult problem before us" (Marchetti v. United States, *supra,* 390 U.S. 39, 58), but it will neither frustrate any apparent significant legislative purpose nor unduly hamper criminal prosecutions of drivers involved in accidents resulting in damage to the property of others.

The face of the statute does not disclose any legislative intent to use the required disclosure of information to facilitate prosecutions for possible criminal acts occurring in connection with automobile accidents involving property damage. If the driver can locate the owner or person in charge of the property damaged he need only disclose to that individual his and the automobile owner's name and address; if he cannot locate such person, he must leave a written notice containing the same information and "a statement of the circumstances" surrounding the accident as well as "notify" local law enforcement officials, ostensibly to make sure that the owner or person in charge of the damaged

property can contact the driver by consulting the written notice or, if it has been removed or destroyed, such officials.

Not only does the statute on its face fail to disclose any legislative concern with facilitating criminal prosecutions but the courts have consistently recognized that the purpose of the statute is to promote the satisfaction of civil liabilities arising from automobile accidents involving property damage by inducing all drivers involved in such accidents to identify themselves to the owners or persons in charge of any damaged property. (People v. Stansberry, *supra*, 242 Cal.App.2d 199, 203; Miglierini v. Havemann, *supra*, 240 Cal.App.2d 570, 573.) In short, in enacting section 20002 and its predecessor sections the Legislature was concerned only with protecting the interests of private parties who suffer loss as the result of property damage occurring in automobile accidents.

Nor is section 20002 part of any larger legislative scheme to facilitate criminal prosecutions. Rather, it is related in coverage and intent to the financial responsibility law (Veh. Code, §§ 16000-16553)[8] the primary purpose of which is to protect persons who while lawfully using the public highways suffer financial loss as a result of another's negligent use of the highways. (Mission Ins. Co. v. Feldt, 62 Cal.2d 97, 101; Interinsurance Exchange v. Ohio Cas. Ins. Co., 58 Cal.2d 142, 153.)

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8. Section 16000 requires the driver of every vehicle involved in an accident resulting from the operation of a motor vehicle on the public highways and damaging the property of any one person in an amount exceeding $200 to report the accident to the Department of Motor Vehicles. With certain exceptions, every such driver must then demonstrate the financial ability to satisfy any judgment that may be recovered against him or the owner of the vehicle for damage to property or suffer a suspension of his driving privileges. (Veh. Code, §§ 16020, 16050-16060, 16080.)

Finally, it is instructive, in determining legislative intent, to consider an analogous field of legislation involving a similar conflict between requiring disclosures for noncriminal purposes and the privilege against self-incrimination. In the statutes requiring drivers involved in accidents resulting in personal injury or death to file accident reports, the Legislature has explicitly subordinated the state's prosecutorial interest to the interest in obtaining the disclosure.[9]

In the present case there is no problem of conflicting state and federal interests; it is the state which both demands disclosure of information in "hit-and-run" accidents and prosecutes those who commit criminal acts on the highways. Imposing use-restrictions in the present case merely involves this court in making a judgment, based on an assessment of probable legislative intent, that the Legislature would prefer to have the provisions of section 20002 of the Vehicle Code upheld even in cases involving possible criminal misconduct at the cost of some burden on prosecuting authorities in criminal cases arising out of or related to an accident covered by that section rather than avoid that burden at the cost of significantly frustrating the important noncriminal objective of the legislation. Imposition of use-restrictions in the present case will not preclude the

9. Section 20012 of the Vehicle Code provides that "All required *accident reports* . . . shall be without *prejudice* to the individual so reporting and shall be for the *confidential use* of the Department of Motor Vehicles and the Department of the California Highway Patrol, except that the Department of the California Highway Patrol or the law enforcement agency to whom the accident was reported shall disclose the contents of the reports . . . to any person who may have a proper interest therein, including, but not limited to [various enumerated private parties possibly affected financially and/or legally by the accident], . . ." (Italics added.) Section 20013 provides that except to prove compliance or noncompliance with the requirement that an accident report be filed no accident report may be "used as evidence in any trial, civil or criminal, arising out of an accident, . . ."

Legislature from overriding our decision if it wishes by simply enacting legislation declaring that information derived from disclosures required by section 20002, subdivision (a), *may* be used in criminal prosecutions, in which case the privilege could be claimed in appropriate situations.

There is another significant distinction between the circumstances in *Marchetti* and the circumstances in the present case. In *Marchetti* the imposition of use-restrictions on information obtained as a result of compliance with the federal wagering tax would have had a much more sweeping effect on state law enforcement than would the imposition of such restrictions here. It appears that most—perhaps almost all—violators of state criminal prohibitions against wagering and related activities are subject to the disclosure requirements of the federal wagering tax. (Marchetti v. United States, *supra*, 390 U.S. 39, 44-46, fns. 5-6.) Thus, the imposition of use-restrictions in order to permit Congress to compel all wagerers to comply with the wagering tax law would have meant that in almost all state prosecutions for wagering or related illegal activities the state would be forced, if the defendant proved compliance with the federal law, to establish that its evidence was untainted. This situation might indeed seriously hamper such state prosecutions. By contrast, far from all criminal violations committed on the highways by drivers of motor vehicles involved property damage. The burden resulting from the imposition of use-restrictions in the latter situation will exist only in those instances where property damage occurs in the course or as a result of a criminal violation committed on the highways by a driver.

We conclude that criminal prosecutions of drivers involved in accidents will not be unduly hampered by rules that prosecuting authorities may not use information di-

vulged as a result of compliance with section 20002, subdivision (a), of the Vehicle Code or the fruits of such information and that in prosecutions of individuals who have complied with that section the state must establish that its evidence is not the fruit of such information.

Since imposition in the present case of use-restrictions as described above will neither frustrate any apparent legislative purpose behind the enactment of section 20002 of the Vehicle Code nor unduly hamper criminal prosecutions of drivers involved in accidents; and since the imposition of such restrictions will not preclude the state Legislature from overriding our decision if it wishes, the reasons impelling the United States Supreme Court to reject the "attractive and apparently practical" suggestion of imposing restrictions in Marchetti v. United States, *supra,* 390 U.S. 39, 58, are absent in the present case, and we must, in order to fulfill our responsibility to protect the privilege against self-incrimination, hold that where compliance with section 20002 of the Vehicle Code would otherwise be excused by an assertion of the privilege, compliance is, as in other cases, mandatory and state prosecuting authorities are precluded from using the information disclosed as a result of compliance or its fruits in connection with any criminal prosecution related to the accident.

In the present case, the superior court correctly concluded that at the time of the accident Byers had reasonable ground to apprehend that if he stopped to identify himself as required by section 20002 of the Vehicle Code he would confront a substantial hazard of self-incrimination. The court had before it the fact that Byers was charged with violating section 21750 of the Vehicle Code and the stipulation that the accident giving rise to the obligation under section 20002 resulted from the alleged violation of section 21750.

Although the privilege against self-incrimination was applicable, the privilege does not furnish a defense to a charge of violation of section 20002 because the purpose of the privilege is satisfied by the rule we adopt today that prosecuting authorities are precluded from using information divulged in compliance with section 20002 and the fruits of such information in circumstances where the driver would otherwise be constitutionally privileged not to comply. Thus, the judgment granting the writ of prohibition cannot be affirmed on the theory, employed by the superior court, that Byers was privileged to withhold the information required by section 20002.

However, it does not follow that the judgment must be reversed; we must determine whether, in light of the fact that we here announce a doctrine new to this state's jurisprudence, fairness dictates that Byers not be punished for his failure to comply with section 20002.

In Murphy v. Waterfront Comm., *supra,* 378 U.S. 52, 79-80, the United States Supreme Court reversed the petitioners' contempt convictions because although under the holding of the case they could be required to testify in view of the court-declared restrictions on the use of their testimony in any federal prosecution, at the time they originally refused to answer they had a reasonable fear that their

testimony could be used by federal authorities in a criminal prosecution. At the time they refused to answer, petitioners' claim of privilege was ineffective under then-controlling decisions. The court, in holding for the first time that the privilege was applicable and that it was satisfied by use-restrictions, felt that fairness required that petitioners be given the opportunity to avoid contempt convictions by answering the questions put to them in light of the new protection afforded them as a matter of constitutional right under the holding of the case.

In the present case, Byers is in a position substantially similar to that of petitioners in *Murphy*. Byers had a reasonable basis for fearing that compliance with the "hit-and-run" statute would produce incriminating evidence which could be used against him in a criminal prosecution. At the time of the accident, Byers' claim of privilege was not supported by then-controlling decisions.[10] This court now holds that the privilege against self-incrimination is applicable to such a case, as Byers urges, but we also establish today for the first time restrictions on the use of information disclosed in compliance with the "hit-and-run" statute, and on the basis of such restrictions, we hold that compliance with the statute is not excused by the existence of the privilege.

The differences between the position of the petitioners in *Murphy* and Byers in this respect are not material.

10. In this respect Byers is in a better position than the petitioners in *Murphy*. They were faced with clear decisions that the privilege was inapplicable, whether or not their statements would be incriminating in a subsequent federal prosecution; Malloy v. Hogan, *supra*, 378 U.S. 1, holding the federal constitutional privilege applicable to state proceedings, was a companion case of *Murphy*. At the time of the accident, the leading California decision, People v. Diller, *supra*, 24 Cal.App. 799, left open the possibility that in some cases the state constitutional privilege would excuse noncompliance with a "hit-and-run" statute.

Byers did not expressly claim the privilege when he left the scene of the accident, but if he had stopped to do so, he would in the light of existing law thereby have rendered nugatory any claim of privilege. Although in *Murphy* the court in vacating the contempt judgment provided that the petitioners would then be required to testify in the light of the new protection afforded them should the state authorities still wish to question them, in the instant case, it does not appear that any valid purpose would be served by requiring Byers to now comply with the "hit-and-run" statute.

We conclude, on the basis of Murphy v. Waterfront Comm., *supra,* that it would be unfair to hold that although Byers correctly asserted that the Fifth Amendment privilege was applicable to the question of his compliance with the "hit-and-run" statute he should have complied because of use-restrictions which he could only have speculated might exist.

The judgment is affirmed.

PETERS, J.

WE CONCUR:

TRAYNOR, C. J.

TOBRINER, J.

MOSK, J.

SULLIVAN, J.

DISSENTING OPINION BY BURKE, J.

I dissent. The majority opinion holds that the privilege against self-incrimination, though applicable to section 20002 of the Vehicle Code, does not furnish a defense to a charge of violation of that section since the privilege is satisfied by precluding prosecuting authorities from using information divulged in compliance therewith (opinion, p. 31). Nevertheless, the majority would affirm the judgment granting the writ of prohibition to Byers on the sole ground that "fairness dictates that Byers not be punished for his failure to comply with section 20002," relying upon *Murphy v. Waterfront Comm.*, 378 U.S. 52, 79-80 (opinion, p. 31). I do not believe that the rationale of *Murphy* should be applied to the instant case.

In *Murphy,* petitioners claimed the privilege and refused to testify at a state agency hearing on the ground that their testimony might tend to incriminate them under federal law. The court held that petitioners could be compelled to answer the questions propounded to them, since the federal authorities would be prohibited from using their testimony or its fruits against them in any subsequent criminal proceeding. However, the court vacated the contempt judgment in order to afford petitioners an opportunity to testify and thereby purge themselves of contempt. The court noted that at the time petitioners refused to testify, they had a "reasonable fear, based on this Court's decision in *Feldman v. United States* . . . [322 U.S. 487], that the federal authorities might use the questions against them . . . ." (378 U.S. at p. 79.)

The result reached in *Murphy* appears defensible, as it not only gave petitioners, who had claimed the privilege under a "reasonable fear" of federal prosecution, an opportunity to purge themselves of contempt by furnishing the

requested information, but also promoted the interests of the state in obtaining that information from them. However, *Murphy* should not be used to totally exculpate Byers from his violation of section 20002.

Unlike the petitioners in *Murphy*, Byers claimed no privilege when he violated section 20002—instead he simply left the scene of the accident without furnishing the required information. Nothing in the record suggests that in so doing Byers intended to claim or exercise the privilege against self-incrimination under a reasonable fear of prosecution. As the majority opinion indicates, California decisions in existence at the time of the accident did not recognize the application of the privilege to "hit-and-run" cases. (Opinion, p. 32.)

Therefore, if Byers was unaware of the existence of the privilege and was not acting in reliance upon existing state law, how are the ends of justice met by excusing Byers from conduct which, as the majority hold, remains unlawful and unprivileged? I cannot see any element of unfairness in holding Byers fully responsible for the consequences of his deliberate violation of section 20002.

Moreover, unlike the result reached in *Murphy*, the majority holding promotes no corresponding governmental interest to balance a determination of leniency towards Byers, since obviously any offer by him to comply with the requirements of section 20002 would come several years too late.

In my view, the judgment of the superior court granting a writ of prohibition was erroneous and should be reversed with appropriate instructions.

BURKE, J.

I CONCUR:
McCOMB, J.

Appendix "B"

UNITED STATES CONSTITUTION

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA VEHICLE CODE

Duty Where Property Damaged

20002. (a) The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either:

(1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, or;

(2) Leave in a conspicuous place on the vehicle or other properly damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol.

Any person failing to stop or comply with said requirements is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not to exceed six months or by a fine of not to exceed five hundred dollars ($500) or by both.

(Stats. 1965, c. 872, 83)

§ 20012. Reports Confidential.

All required accident reports, and supplemental reports, shall be without prejudice to the individual so reporting and shall be for the confidential use of the Department of Motor Vehicles and the Department of the California Highway Patrol, except that the Department of the California Highway Patrol or the law enforcement agency to whom the accident was reported shall disclose the entire contents of the reports, including, but not limited to, the names and addresses of persons involved in, or witnesses to, an accident, the registration numbers and descriptions of vehicles involved, the date, time and location of an accident, *all diagrams, statements of the drivers involved in the accident and the statements of all witnesses,* to any person who may have a proper interest therein, including, *but not limited to,* the driver or drivers involved, or the legal guardian

thereof, the parent of a minor driver, the authorized representative of a driver, or to any person injured therein, the owners of vehicles or property damaged thereby, *persons who may incur civil liability, including liability based upon a breach of warranty arising out of the accident, and any attorney who declares under penalty of perjury that he represents any of the above persons* [Amended by Stats. 1965 ch. 1285 § 1; Stats. 1969 ch. 19 § 1.]

§ 21750. Overtake and Pass to Left. The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance [1] without interfering with the safe operation of the overtaken vehicle, subject to the limitations and exceptions hereinafter stated. [Amended by Stats. 1961 ch. 577 § 1.]

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FILED
JUN 15 1970
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM 1969

No. ~~1970~~ 75

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

JONATHAN TODD BYERS,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of California

Brief for the Petitioner

THOMAS C. LYNCH
Attorney General of the State of California

ALBERT W. HARRIS, JR.
Assistant Attorney General

LOUISE H. RENNE
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-1337

Attorneys for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM 1969

No. 1070

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

JONATHAN TODD BYERS,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of California

Brief for the Petitioner

OPINIONS BELOW

The opinion of the Supreme Court of the State of California is reported at 71 A.C. 1083, 80 Cal.Rptr. 553, and 458 P.2d 465 (September 16, 1969). It is also set forth in its entirety in the Appendix at pages 58-84.

JURISDICTION

The Supreme Court of the State of California entered judgment in this case on September 16, 1969. A timely petition for rehearing was filed on October 1, 1969. On October 15, 1969 the Order Denying Rehearing was filed. The jurisdiction of this Court is invoked under Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

1. Does the requirement imposed by a state "hit-and-run" statute that a driver involved in an accident resulting in property damage must stop and identify himself violate the Fifth Amendment privilege against self-incrimination?

2. Is it necessary to bar the use of the information derived from compliance with section 20002 or its fruits as evidence in any criminal proceeding in order to sustain the constitutionality of the statute?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case presents the applicability of the Fifth and Fourteenth Amendments of the Constitution of the United States to the provisions of section 20002(a) of the California Vehicle Code. The pertinent constitutional and statutory provisions are set forth herein and in Appendix A of our brief.

STATEMENT OF THE CASE

A. Lower State Court Proceedings.

On August 22, 1966, a two-count criminal complaint was filed in the Mendocino County Justice Court for the Ukiah Judicial District in California, charging the respondent Jonathan Todd Byers with two misdemeanor violations of the California Vehicle Code. Count one of the complaint

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1. Section 21750 provides: "The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe operation of the overtaken vehicle, subject to the limitations and exceptions hereinafter stated."

charged Byers with improper and unsafe driving in violation of section 21750 of the Vehicle Code.[1] Count two charged that he violated section 20002(a) of the California Vehicle Code (failure to stop at the scene of an accident resulting in property damage) (A. 7, 12-13).[2]

Byers filed a demurrer to Count two of the complaint (A. 14-17). He claimed, *inter alia*, that section 20002(a) was unconstitutional on its face and as applied because it violated the privilege against self-incrimination guaranteed by both the federal and state constitutions (A. 8, 14-17). It was stipulated by counsel that both charges contained in the complaint arose from the same accident (A. 8-9). On December 7, 1966, the Justice Court overruled the demurrer (A. 8-9).

On January 13, 1967, Byers filed a petition for writ of prohibition in the Mendocino County Superior Court (A. 7-25). In the Superior Court Byers again urged that the privilege against self-incrimination barred his prosecution under Count two. He contended that compliance with the "hit-run" provisions of section 20002(a) violated the privilege against self-incrimination when he was also charged

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2. At the time of the accident section 20002, subdivision (a), provided: "The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either: (1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, or; (2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol. Any person failing to stop or to comply with said requirements under such circumstances is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not to exceed six months or by a fine of not to exceed five hundred dollars ($500) or by both."

In 1967 this section was amended in several minor respects not pertinent to this case.

with another criminal offense arising from the same accident (A. 9). On February 17, 1967, the Superior Court issued an opinion in support of the writ of prohibition sought by Byers (A. 36-45). The Court held that section 20002(a) could not be applied against Byers without violating the privilege against self-incrimination under the Fifth Amendment of the Constitution of the United States. Accordingly, on March 21, 1967 the Court issued a Permanent Writ of Prohibition to restrain further proceedings in the Justice Court on Count two of the Complaint (A. 3).

B. State Appellate Proceedings.

On March 2, 1967 a notice of appeal was filed in the California Court of Appeal (A. 57). The Court of Appeal reversed the decision of the Superior Court and held that enforcement of the "hit-run" statute against Byers was not barred.[3] However, in reaching that decision the Court of Appeal held that the Fifth Amendment privilege against self-incrimination was infringed by a requirement that a driver involved in an accident must stop and identify himself in any case where he was later charged with a criminal offense arising from the accident. The rationale of the Court's decision was that compliance with section 20002(a) would require Byers to admit that he was the driver who passed unsafely in violation of section 21750. Nevertheless, the Court of Appeal also held that compliance with section 20002(a) could be constitutionally justified if admissions made in compliance with the statute were not later used in evidence. Accordingly, by adoption of the theory of "use-restriction" the Court upheld enforcement of the statute.

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3. That opinion which is not reported in the permanent volumes of the Official California reports is nevertheless set forth at 265 A.C.A. 1031, 71 Cal.Rptr. 609 (1968).

Both the People of the State of California and the respondent Byers filed a Petition for Hearing in the California Supreme Court. On November 20, 1968, the Court granted a hearing on the matter. Following briefing and argument, the Supreme Court on September 16, 1969 issued its opinion affirming the decision of the Superior Court and holding that enforcement of the statute against Byers was barred (A. 58-84). In reaching that decision, the Supreme Court concluded that compliance with section 20002(a) was the mandatory duty of all drivers in California. However, the Court also held: (1) that the Fifth Amendment privilege against self-incrimination was applicable to the requirements of section 20002(a). The Court stated that:

> "We are satisfied that the privilege is applicable when a driver involved in an accident is confronted with a statutory requirement to stop and divulge his identity and reasonably believes that compliance with the statute will result in self-incrimination" (A. 66).

However, the Court also held: (2) that compliance with the statute could be sustained if no use were made of the required information or its fruits in connection with any criminal proceeding. The Court stated that:

> ". . . we must, in order to fulfill our responsibility to protect the privilege against self-incrimination, hold that where compliance with section 20002 of the Vehicle Code would otherwise be excused by an assertion of the privilege, compliance is, as in other cases, mandatory and state prosecuting authorities are precluded from using the information disclosed as a result of compliance or its fruits in connection with any criminal prosecution related to the accident." (A. 79).

Finally, the Court also held: (3) that since, at the time of the accident, Byers could not reasonably have anticipated the Court's decision precluding from use information divulged in compliance with section 20002 or its fruits in

circumstances where the driver would otherwise be constitutionally privileged not to comply, "fairness" dictated that Byers should not be punished for his failure to comply with the statute (A. 79-82). Accordingly, the Court held that prosecution under Count two of the Complaint was barred (A. 82).

SUMMARY OF ARGUMENT

I

In the decision below the California Supreme Court held that all motorists in California must comply with section 20002(a). Under this statute it is a misdemeanor offense for any driver involved in an accident resulting in property damage to leave the scene of the accident without stopping to identify himself or to otherwise comply with the duties imposed.

The State Supreme Court was correct in holding that all motorists must comply with section 20002(a). A requirement of this kind is based upon humanitarian interests and serves to protect against financial loss. All 50 states and the District of Columbia require a driver involved in an accident to stop and identify himself. The Uniform Vehicle Code also imposes this kind of duty.

However, the Court below erred when it also held that compliance with section 20002(a) violates the Fifth Amendment privilege against self-incrimination in any case where the driver reasonably believes that compliance will result in self-incrimination. In holding that the privilege against self-incrimination applies to even the minimal duty imposed upon a driver to stop and to identify himself, the Court created an "extravagant extension of the Fifth Amendment". *Holt v. United States,* 218 U.S. 245, 252-253 (1910), *United States v. Wade,* 388 U.S. 218, 222 (1967).

II

The privilege against self-incrimination does not apply to a requirement that a driver involved in an accident resulting in property damage must stop and identify himself because:

(1) Compliance with such a requirement does not constitute a substantial hazard of self-incrimination;

(2) A requirement to stop and to identify oneself is non-testimonial in nature; and

(3) Compliance with the "hit-and-run" statute does not undercut the values upon which the privilege against self-incrimination rests.

III

The Court below appeared to rely on this Court's decisions in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965); *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); and *Haynes v. United States*, 390 U.S. 85 (1968). However, the Court extended the holdings of those cases beyond anything ever suggested in those decisions. Those cases presented statutory schemes calculated to secure convictions by directing registration requirements to persons "inherently suspect of crime" in "areas permeated with criminal statutes". Compliance with section 20002 does not begin to approach this kind of situation.

On the contrary, the *Marchetti-Grosso-Haynes* cases make clear that information which is general in nature and acquired in the course of a non-criminal regulatory program may be obtained and used in a criminal proceeding without infringing the privilege against self-incrimination. Thus, the Court was careful to distinguish the case of *United States v. Sullivan*, 274 U.S. 259 (1927), requiring an income tax return to be filed even if the income was earned illegally

and *Shapiro v. United States*, 335 U.S. 1 (1948), embodying the required records doctrine.

IV

Assuming arguendo that the privilege against self-incrimination does apply to the requirement that a driver must stop at the scene of an accident and give his name and address, the state has an overriding and compelling interest both in requiring compliance with its "hit-and-run" statute and in enforcing its criminal laws.

The difficulty in proving "untainted" evidence in a "hit-and-run" case where compliance must be achieved on the spot, if at all, is so great and the information as to a driver's identity so general in nature, that the state ought not to be precluded from using that information or the fruits of that disclosure in any criminal proceeding. The effect of the Court's decision is to automatically immunize the criminal conduct of a driver. If self-incrimination is involved in requiring a driver to stop and identify himself, use of the information acquired is a price that must be paid for the orderly use and safety of the state's highways.

I. The California Supreme Court Correctly Held That All Motorists Must Comply With Section 20002(a)

In the decision below the California Supreme Court held that all motorists must comply with section 20002(a) of the California Vehicle Code. Under that statute any driver involved in an accident resulting in property damage must stop at the scene of the accident. If he can locate the owner or person in charge of the property damaged, he need only give to that individual his name and the automobile owner's name and address. If he cannot locate that person, he must leave a written notice giving that same information and a statement of circumstances on the property damaged and notify the local law enforcement officials of the accident.

Undoubtedly the latter requirements were enacted to make sure that the owner or person in charge of unattended property could contact the driver by consulting the note, or if it was lost or destroyed, such officials.

Section 20002(a) of the California Vehicle Code is one part of the California statutory plan for the orderly use of its highways. Other provisions impose a similar duty upon a driver to stop and identify himself and render aid and assistance where death or injury to the person has occurred. (California Vehicle Code, Sections 20001, 20003-20004). There are other provisions which require written accident reports to be filed where the amount of property damage involved is more than $200, or where death or injury has occurred (Calif. Veh. Code, §§ 20008-20009; and see the California Financial Responsibility Law set forth in Calif. Veh, Code §§ 16000, et seq.).

The requirement that a driver must stop and identify himself was imposed in California as early as 1905 when automobile travel was first beginning to be a common mode of travel (see Stats. 1905, Ch.612, p.818; § 3(5); see also Penal Code § 367(c), repealed, Stats. 1935, Ch.27, § 802, p.247). Since its inception in 1926 the Uniform Vehicle Code has contained similar provisions requiring drivers involved in accidents to stop and identify themselves (UVCA §§ 10-101—10-105). Today, all states and the District of Columbia have laws requiring drivers involved in an accident to stop and identify themselves (See Annotations UVCA §§ 10-102(a), 10-103, 10-104(a), 10-105).

It appears that all jurisdictions provide in some way for accidents involving damage to attended vehicles or property (Annotation, UVCA 10-103, at 34-37). As to accidents involving damage to unattended property, it appears that the laws of 43 jurisdictions expressly require the driver to stop and identify himself, while that duty may be inferred from the laws of most other jurisdictions (Annotation UVCA

§ 10-105, at 50-55). The provisions contained in the Uniform Vehicle Code (UVCA § 10-103, 10-105) and the provisions of section 20002(a) are in substantial accord.[4]

The California Supreme Court was correct in holding that all motorists must comply with section 20002(a). Section 20002(a) is constitutional as enacted. Thus, "hit-and-run" statutes which require a driver to stop and identify himself or to render aid and assistance, serve to insure that persons injured are given necessary aid and care. *People v. Scofield,* 203 Cal. 703, 708, 265 Pac. 914, 916 (1928). They also serve to protect property owners against financial loss. *People v. Stansberry,* 242 Cal.App.2d 199, 203, 51 Cal. Rptr. 403, 406 (1966); *Miglierini v. Havemann,* 240 Cal. App.2d 570, 573, 49 Cal.Rptr. 795, 797 (1966). Undoubtedly, too, if such statutes did not exist and compliance was not required, the remedy of "self-help" would soon become the order of the day.

Indeed, it may be asserted that both drivers and non-drivers alike have always viewed a requirement that a driver stop and identify himself or render aid and assistance as reasonable and necessary and as constituting the minimum acceptable standard for drivers involved in an accident. Such statutes are regarded as having a moral content and a universal public acceptance as being fair. Today, with the ever increasing number of automobiles on the highways

4. Thus, the Uniform Vehicle Code requires that a driver involved in an accident resulting in property damage must stop and identify himself. If the property is unattended, he must leave a note and notify the police. Although the note need not set forth the circumstances of the accident, it must give the driver's name and address and the registration number of the vehicle he is driving.

and the attendant dangers, the need for such statutes is as great as it ever was and probably more so.[5]

As a result of considerations such as these, "hit-and-run" statutes have been uniformly upheld since their inception, despite the claims of self-incrimination which have been made. Before this Court's decision in *Malloy v. Hogan*, 378 U.S. 1 (1964), holding the Fifth Amendment privilege against self-incrimination to be applicable to the states, the constitutionality of "hit-and-run" statutes had been upheld in such decisions as:

Commonwealth v. Joyce, 326 Mass. 751, 97 N.E.2d 192 (1951); *Ule v. State*, 208 Ind. 255, 194 N.E. 140 (1935); *People v. Rosenheimer*, 209 N.Y. 115, 102 N.E. 530 (1913); *People v. Thompson*, 259 Mich. 109 242 N.W. 857 (1912); *State v. Sterrin*, 78 N.H. 220, 98 A. 482 (1916); *Ex parte Kneedler*, 243 Mo. 632, 147 S.W. 983 (1912); and *State v. Razey*, 129 Kan. 328, 282 P. 755 (1929).

In California, "hit-and-run" statutes had been previously upheld in *People v. Diller*, 24 Cal.App. 799, 142 P. 797 (1914); and *People v. Fodera*, 33 Cal.App. 8 164 P.22 (1917); and

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5. In support of this proposition, it may be noted that the 1969 edition of "Accident Facts" published by the National Safety Council, reports that in 1968 there were 46,800 fatal automobile accidents in the United States resulting in 55,200 deaths. "Accident Facts" also reports that there were 1,300,000 injury accidents resulting in 2,000,000 injuries; and, that there were 13,300,000 reported property damage accidents resulting in an estimated property damage cost of $3,800,000. Combined with an estimated cost of injuries and insurance costs, the total estimated costs for motor-vehicle accidents in 1968 was $11,300,000. Thus, the necessity for the continued enforcement of "hit-and-run" statutes would seem clear. National Safety Council, Accident Facts at 3-5, 40 (1969 Ed).

cf. *People v. McCormick,* 102 Cal.App.2d Supp. 954, 963-964, 228 P.2d 349, 355 (1951).[6]

Only in *Rembrandt v. Cleveland,* 28 Ohio App. 4, 161 N.E.2d 364 (1927), had a state court declared its "hit-and-run" statute unconstitutional. However, the court did so on the ground that the particular statute involved required a full report concerning all details of the accident. The Court specifically stated that another "hit-and-run" statute could be drafted which would be constitutional.

Decisions since *Malloy v. Hogan, supra,* had also rejected claims of compulsory self-incrimination. Thus, in *People v. Limon,* 252 Cal.App.2d 575, 60 Cal. Rptr. 448 (1967) and *People v. Bammes,* 265 Cal.App.2d, 626, 71 Cal. Rptr. 415 (1968), California lower courts had held that the privilege against self-incrimination was not infringed by requiring compliance with the personal injury "hit-and-run" statute. (Calif. Veh. Code § 20001). In *State v. Lemme,* 107 N.H. 437, 244 A.2d 585 (1968) the Rhode Island Supreme Court held, inter alia, that since the defendant had not complied with a "hit-and-run" statute similar to section 20002, the defendant could not claim that compliance with the statute would have resulted in self-incrimination as to him. Similarly, in *People v. Lucas,* 41 Ill.2d 370, 243 N.E.2d 228 (1968) the Illinois Supreme Court had held that "using the standard of *Marchetti v. United States,*" 390 U.S. 39 (1968), a statute which required the driver to disclose his name and address, the registration number of his vehicle, and upon proper request, his driver's license, did not "present a substantial and real hazard of incrimination".

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6. Indeed, it may be noted that in the *McCormick* case the Court struck down a Communist Party registration statute, on the ground that it violated the privilege against self-incrimination, as this Court later did under the Fifth Amendment in *Albertson v. SACB,* 382 U.S. 70 (1965). However, in the *McCormick* case, the Court specifically recognized that a requirement that a driver stop at the scene of an accident and give his name and address was an entirely different matter, and that this requirement did not violate the privilege against self-incrimination.

Thus, to the extent that the decision below holds that all motorists must comply with section 20002(a), it is correct and in the mainstream of judicial authority. However, the decision below is totally incorrect to the extent that it also holds that compliance with section 20002 may violate the Fifth Amendment privilege against self-incrimination.

In reaching that decision the Court did not find any particular provision of section 20002 to be unconstitutional. Accordingly the constitutional arguments that might be considered with respect to any particular requirement imposed by section 20002 need not be considered here.[7] However, what the Court did hold is that the Fifth Amendment privilege against self-incrimination does apply whenever a driver is required to stop and identify himself and reasonably believes that to do so will result in self-incrimination. Thus, the Court stated that:

> "We are satisfied that the privilege is applicable when a driver of a motor vehicle involved in an accident is confronted with a statutory requirement to stop and divulge his identity and reasonably believes

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7. For example, in *State v. Lemme*, 107 N.H. 437, 244 A.2d 585 (1968) the defendant had argued that to leave a note giving a "statement of circumstances" on unattended property, violated the Fifth Amendment privilege against self-incrimination. In rejecting that argument, the Court stated:

"We do not perceive that the required statement calls for information so detailed as to suggest, let alone admit, that the collision was the result of conduct amounting to a misdemeanor. Rather, we believe, and so hold, that the requirements of a statute are met by leaving a statement written in the English language which acknowledges participation in the collision, together with the names and addresses of the driver and the owner of the colliding vehicle. With its use of the phrase 'circumstances of the collision,' the legislature was suggesting to the colliding operator such additional information as to him might seem pertinent. It could not and did not intend to require criminal self-incrimination."

that compliance with the statute will result in self-incrimination." (A. 66).

In reaching that conclusion, the Court created an "extravagant extension of the Fifth Amendment." *Holt v. United States,* 218 U.S. 245, 252-253 (1910); *United States v. Wade,* 388 U.S. 218, 222 (1967). It is our position that the privilege against self-incrimination is not infringed by the minimal duty imposed by section 20002(a) requiring any driver to stop at the scene of an accident and to give his name and address.

II. The Privilege Against Self-Incrimination Does Not Apply to a Statutory Requirement That a Driver Involved in an Accident Resulting in Property Damage Must Stop and Identify Himself

A. COMPLIANCE WITH SECTION 20002(a) DOES NOT CREATE A SUBSTANTIAL HAZARD OF SELF-INCRIMINATION

The scope of the Fifth Amendment privilege has traditionally been "confined to real danger, and does not extend to remote possibilities out of the ordinary course of law". *Heike v. United States,* 227 U.S. 131, 144 (1913). "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real' and not merely trifling or imaginary, hazards of incrimination." *Marchetti v. United States,* 390 U.S. 39, 53 (1968).

Compliance with section 20002(a) does not create a substantial hazard of self-incrimination. Thus, section 20002 (a) requires that all drivers involved in an accident resulting in property damage must stop at the scene of the accident and leave their name and address. It is not a crime to be involved in an accident, and the fact that a motor vehicle has been damaged does not mean that a crime is involved. By its terms, section 20002(a) requires all drivers

to stop, regardless of fault. If a crime is involved and a particular driver at fault, this must be established from other facts. As section 20002 is directed to all drivers who might chance to be involved in an accident, neither the requirement to stop or to give a name and address tends to establish guilt.

In many cases compliance with section 20002(a) may be achieved without any knowledge or involvement by the state. In the case of attended property, a driver need only stop and give his name and address to the other driver involved. On the other hand, when a driver who has caused damage to unattended property must notify public officials of the accident, there is no requirement that he go to the police station to do so. Indeed, should the state later learn of the accident or become otherwise involved in the matter, this Court's decision in *Miranda v. Arizona,* 384 U.S. 436 (1966) fully serves to protect against self-incrimination.

Thus, while the *Miranda* decision specifically approves general on-the-scene questioning, it also points out that the privilege against self-incrimination is jeopardized "when an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning." *Miranda v. Arizona,* at 478. When that stage is reached, *Miranda* warnings must be given and a waiver of rights obtained before any statement made may be used in evidence.

The Court below has now extended the *Miranda* decision by holding that the Fifth Amendment privilege against self-incrimination is applicable whenever a driver involved in an accident must stop and give his name and address and reasonably believes that in doing so, self-incrimination will result. How it is to be determined whether the driver's fear of self-incrimination is reasonable, is a matter which is not spelled out in the decision below.

Indeed, the decision below is inconsistent with other decisions of this Court holding that a police officer may stop a citizen under circumstances other than probable cause without violating the Constitution. *Terry v. Ohio*, 392 U.S. 1 (1968). Thus, an officer may make reasonable inquiries and where necessary, conduct a "pat-search". In the present case Byers could have been required to stop by a policeman rather than by a "hit-and-run" statute. Nevertheless, under the decision below, if Byers had stopped and given his name and address and at the time reasonably believed that compliance would result in self-incrimination, this information, too, would fall within the scope of the privilege against self-incrimination and become automatically immunized. Similarly, if instead of driving unsafely, Byers had been driving without a license or in a stolen car, his failure to present a license or to present proper registration for the car, would constitute compulsory self-incrimination if the decision below is correct. Consequently, this information too could not be used in any subsequent criminal proceeding. We submit that the Fifth Amendment does not require this result.

Nevertheless, it has been argued throughout these proceedings that the privilege against self-incrimination is violated because the state might eventually learn the identity of the driver if he is required to comply with section 20002. The argument has been made that this knowledge plus proof of a crime may lead to a criminal prosecution. However, while knowledge of a driver's identity and the initiation of a criminal prosecution are several steps removed, this contention, in any event, ignores that the privilege against self-incrimination does not guarantee anonymity. *Schmerber v. California*, 384 U.S. 757 (1966); cf. *Minor v. United States*, 396 U.S. 87, Ftn. 3 at 91 (1969). This

contention also ignores that the privilege against self-incrimination does not provide a constitutional right to escape from official attention.

This point was made in *United States v. Sullivan*, 274 U.S. 259 (1927). There a taxpayer sought to avoid filing an income tax return on the ground that he had earned his income illegally. In rejecting the privilege against self-incrimination as a defense to the charge of wilful failure to file an income tax return, the court concluded that most of the questions on the return would not have compelled the taxpayer to make incriminating disclosures and that accordingly it would be an "extreme if not extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime." Id, at 263-264.

The *Sullivan* case suggests that while there may be a point at which the privilege against self-incrimination may apply to any information given in the course of a regulatory program, the privilege does not apply at the threshold.

B. A REQUIREMENT THAT A DRIVER MUST STOP AND GIVE HIS NAME AND ADDRESS IS NON-TESTIMONIAL IN NATURE AND THEREFORE NOT WITHIN THE SCOPE OF THE PRIVILEGE AGAINST SELF-INCRIMINATION.

If section 20002(a) required only that a driver must stop, we submit that, as a course of conduct, that requirement would not fall within the scope of the privilege against self-incrimination. It is non-testimonial in nature. Indeed, if the fact that a driver stops should be considered testimonial in nature, it is testimony of innocence and not of guilt. For it is when a driver does not stop that his flight may be considered as a circumstance tending to show guilt. *People v. Brooks*, 64 Cal.2d 130, 138, 48 Cal.Rptr. 879, 885, 410 P.2d 383, 389 (1966); cf. *E. J. Willig Truck Transp. Co.*, 40 Cal.2d 669, 676, 255 P.2d 802, 806-807 (1953).

The further duty imposed by the state—to give a name and address—is for identification purposes only, and evidence which serves only to identify is also considered non-testimonial in nature.

For example, an accused may be fingerprinted, photographed, and measured without his consent; blood samples may be taken from his person if the means used to obtain them do not shock the conscience. *Schmerber v. California,* 384 U.S. 757 (1966). Similarly, he may be required to stand in a courtroom or to answer if he is the defendant named in the indictment. *Peoples v. United States,* 365 F.2d 284 (10th Cir. 1966); *Swingle v. United States,* 151 F.2d 512, 513 (10th Cir. 1945). A defendant may also be required to give a handwriting exemplar, *Gilbert v. California,* 388 U.S. 263, 265-267 (1967), or be compelled to speak in a line-up for voice identification, *United States v. Wade,* 388 U.S. 218, 221-223 (1967). These kinds of evidence have been considered to be non-testimonial in nature, and as such, they do not fall within the privilege against self-incrimination. *Schmerber v. California, supra.*

Accordingly, if a "hit-and-run" statute required a driver to stop and to leave a fingerprint, these acts would not be considered to be testimonial, and within the scope of the privilege. When, on the other hand, a driver has only to leave his name and address, this course of conduct also should not be considered to be testimonial in nature and within the scope of the privilege.

C. COMPLIANCE WITH SECTION 20002 DOES NOT UNDERCUT THE VALUES UPON WHICH THE PRIVILEGE AGAINST SELF-INCRIMINATION RESTS.

The requirement that a driver must stop at the scene of an accident and furnish his name and address does not undercut the values upon which the privilege against self-incrimination rests.

As the Court stated in *Miranda v. Arizona, supra,* at p. 460, "All these policies point to one overriding thought: the Constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government to 'shoulder the entire load' .... to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."

However, these values are not infringed by requiring compliance with section 20002. The policies underlying the privileges are not infringed (1) because compliance with section 20002(a) must be made on the spot, if at all, and (2) because the information given is so general in nature. Thus, in requiring a driver to stop and to give his name and address, there is no danger that the police and prosecuting officials will be encouraged to rely on a driver's self-disclosure, rather than seeking themselves to produce evidence of crime through their own independent labors.

Indeed, the fact that compliance with section 20002(a) can only be achieved "on-the-spot", if at all, serves to demonstrate the state's difficulty in proving that any evidence it has produced through its own labors is, nevertheless, "untainted." The Court below has stated that:

> "... we must, in order to fulfill our responsibility to protect the privilege against self-incrimination, hold that where compliance with section 20002 of the Vehicle Code would otherwise be excused by an assertion of the privilege, compliance is, as in other cases, mandatory and state prosecuting authorities are precluded from using the information disclosed as a result of compliance or its fruits in connection with any criminal prosecution related to the accident." (A. 79).

However, compliance with section 20002(a) requires a driver to stop, as well as to give his name and address. Is information derived from the fact that a driver stopped also rendered inadmissible by the Court's decision? For example, if a driver does stop at the scene of an accident, and a policeman should arrive and administer a test to determine sobriety, are the results of that test to be classified as "fruits" of the driver's compliance with section 20002(a)? Are the results of this test inadmissible even though they have been otherwise held to fall outside the scope of the privilege against self-incrimination? *Schmerber v. California, supra.* On the other hand, if the state can show that the driver stopped, not because of the "hit-and-run" statute, but because his car was so badly damaged that it could not be driven any farther, does evidence of the driver's identity and the results of such tests then become admissible? The difficulties raised by the decision of the Court below only serve to emphasize its erroneous nature.

III. The Court Below Extended the Holdings of the Albertson-Marchetti-Grosso-Haynes cases Beyond Anything Ever Suggested by Those Decisions.

In reaching its decision the Court below appeared to rely on this Court's decisions in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965); *Marchetti v. United States,* 390 U.S. 39 (1968); *Grosso v. United States,* 390 U.S. 62 (1968); and *Haynes v. United States,* U.S. 390 U.S. 85 (1968). However, the Court extended the holdings of those cases beyond anything ever suggested by those decisions.

Thus, in the *Albertson* case this Court was concerned with a statutory scheme whereby Communist Party members were required to register as such and to file information regarding their membership with the Attorney General. This Court previously had held that mere association with the Communist Party presented a sufficient threat

of prosecution to support a claim of privilege. *Patricia Blau v. United States*, 340 U.S. 159 (1950); *Irving Blau v. United States*, 340 U.S. 332 (1950); *Brunner v. United States*, 343 U.S. 918 (1950); *Quinn v. United States*, 349 U.S. 155 (1955).

Similarly, *Marchetti* and *Grosso* presented comprehensive statutory schemes where, by the very act of filing wagering tax forms and paying the wagering tax, the registrants were admitting that they were presently engaged in unlawful conduct or that they planned to do so in the future. Gambling in one form or another was shown to be illegal in all 50 states. In *Haynes*, the very act of registering would have constituted a direct admission that an unregistered firearm was acquired in violation of the National Firearms Act. It was the "uncommon" case where compliance with the statute did not involve *per se* illegality. The more recent decision of this Court in *Leary v. United States*, 395 U.S. 6 (1969), dealing with the Marijuana Tax Act, presented the same kind of dilemma, whereby the potential registrant was faced with a "choice between the rock and the whirlpool."

As this Court pointed out in each of these cases, the statutory requirements involved were directed "unmistakably" to persons "inherently suspect of crime" in areas "permeated with criminal statutes." Whatever the ostensible purpose, it was clear that a comprehensive scheme had been established in each case primarily to secure convictions. As the Court stated in *Marchetti*, "in these circumstances, it can scarcely be denied that the obligations to register and pay the occupational tax created for petitioner 'real and appreciable' and not merely 'imaginary and insubstantial' hazards of self-incrimination." *Marchetti v. United States*, supra, at 48.

The statutory requirements of section 20002(a) do not begin to approach this kind of situation.

Thus, a requirement under which any driver involved in an accident must stop at the scene of the accident and give his name and address, is not a requirement directed "unmistakably" to persons "inherently suspect of crime." It is not a crime to be involved in an accident. Section 20002 does not require that only drivers at fault must stop, but it requires all drivers who might chance to be in an accident resulting in property damage to stop.

Similarly, it is unrealistic to characterize driving as an area "permeated with criminal statutes." There are to be sure, criminal statutes which remain to be enforced, and must be enforced, if the goal of highway safety is to be sought. Thus, for example, it is a criminal offense to drive under the influence of liquor or narcotics (Calif. Veh. Code, § 23102, 23105). On the other hand, there has been a trend toward classifying many traffic offenses as infractions only. (Calif. Veh. Code § 40000).

Nevertheless, the Fifth Amendment does not bar from evidentiary use all information that may be acquired in the course of a governmental regulatory program. The Court made this distinction clear when, in *Marchetti, Grosso* and *Haynes* it carefully distinguished the decisions of *United States v. Sullivan, supra,* dealing with the filing of income tax returns, and *Shapiro v. United States,* 335 U.S. 1 (1948), embodying the required records doctrine. Thus, the Court in *United States v. Sullivan, supra,* had held that the privilege against self-incrimination did not excuse a taxpayer from filing an income tax return even if he had earned his money illegally.

Similarly, in *Shapiro v. United States,* 335 U.S. 1 (1948) the Court held that neither an immunity statute nor the Fifth Amendment privilege barred compliance with a sub-

poena for the production of records required to be kept by the Office of Price Regulation, even though such information was later used in a criminal proceeding. In both the *Shapiro* and *Sullivan* cases, as here, the statutes were neutral on their face, and their enforcement had overriding "public aspects" which the *Albertson-Marchetti-Grosso-Haynes* cases did not.

As Mr. Justice Brennan noted in his concurring opinion in *Grosso v. United States,* 390 U.S. 72 at 73:

> "United States v. Sullivan, supra, makes clear that an individual is not exempted, by the fact that he may be privileged to refuse to answer some questions, from a requirement, 'directed at the public at large,' of filing an income tax return exclusively containing questions 'neutral on their face.' Albertson v. SACB, 382 U.S. 70, 79. Shapiro v. United States, supra, involved a similar situation; it involved a record-keeping requirement pursuant to a neutral governmental system of price regulation."

In *Sullivan* and *Shapiro,* as here, the inquiries made are directed to the "public at large" and involve essentially "neutral" information.[8]

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8. See also *Warszower v. United States,* 312 U.S. 342 (1941) (Information demanded on registration draft form revealed that defendant was an alien who entered the country illegally); *United States v. Walden,* 411 F.2d 1109 (4th Cir. 1969) cert. den. 396 U.S. 931 (1969) (The Fifth Amendment privilege against self-incrimination is not a defense to charges of violations of provisions of the internal revenue code requiring the bonding of a distillery and designation of place of manufacture); *People v. Mendoza,* 251 Cal.App.2d 835, 60 Cal. Rptr. 5 (1967) (Use of information as to identity derived from identification cards for aliens habitually crossing the international border not within the privilege against self-incrimination where defendant was charged with possession by an alien of a concealable firearm); *United States v. Olson,* 253 Fed. 233 (W.D. Wash. 1917) (Failure to exhibit registration certification for draft when called upon by police officer to do so held not to violate the privilege against self-incrimination.)

IV. Assuming Arguendo That the Privilege Against Self-Incrimination Does Apply to the Requirements Imposed by Section 20002, Use of the Information and Its Fruits in any Criminal Proceeding Is Required Because of the Overriding and Compelling State Interest.

Assuming arguendo that the privilege against self-incrimination does apply to a requirement that a driver must stop and give his name and address, the state has an overriding and compelling state interest both in demanding compliance with the statute and in enforcing its criminal laws. As noted, supra, at page 10, section 20002 was enacted to protect property owners against financial loss. This has been recognized as a valid state measure by this Court in *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962) wherein this Court upheld the Utah Financial Responsibility Law.

On the other hand, the state has an equally compelling interest in adopting and enforcing stringent measures to protect the interests of drivers and pedestrians alike in an effort to assure highway safety. This interest also was recognized by the Court as early as 1927 when in the course of upholding a "non-resident" motorist statute, the Court stated in *Hess v. Pawloski*, 274 U.S. 352, 356 (1927):

> "Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the State where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights."

While the Court below has held that all motorists must comply with section 20002, it has, on the other hand, made

the state's ability to enforce its criminal laws difficult, if not impossible. Compliance with section 20002 must be made on the spot, if at all. Under the decision below when a driver stops in compliance with section 20002, he apparently not only automatically immunizes the particular words he is required to speak (i.e. his name and address) but also the fact that he has stopped and the fruits of that stopping. Even if there are 20 witnesses to the accident is it still possible to say that the state did not learn the driver's identity because he stopped? As a practical matter, the Court below has not only granted "use" immunity, but has totally and automatically immunized the conduct of a driver who is driving in a criminal fashion.

In the area of driver regulation and highway safety this result is untolerable. It is because automobiles are "dangerous instrumentalities" that the state requires that only qualified persons may be licensed to drive. It is because automobiles are "dangerous instrumentalities" that the state also exercises its right to suspend and revoke licenses where negligent or criminal driving is involved. It is because automobiles are "dangerous instrumentalities" that the duty to stop and to identify oneself or to render aid and assistance must be required of all drivers, regardless of who caused the accident or why.

Accordingly, for the reasons previously stated, we respectfully submit that the privilege against self-incrimination is not violated by requiring compliance with section 20002. However, if the privilege against self-incrimination is applicable, information disclosed as to name and address is general enough, and the interest of the state compelling enough to hold that this infringement is the price that must be paid for the orderly use and safety of the state's highways. As the Court noted on another occasion, in

United States v. O'Brien, 391 U.S. 367, 376-77 (1968), (the "draft-card burning" case):

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non speech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the supression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. [Footnotes omitted.]"

If compliance with section 20002 does infringe the privilege against self-incrimination, we respectfully submit that it is an incidental restriction at most. A requirement to stop and identify oneself must be sustained and that information must used in a criminal proceeding. This requirement may be validly sustained as the price to be paid for the safety and the orderly use of a state's highways.

CONCLUSION

For the foregoing reasons we respectfully submit that the privilege against self-incrimination does not apply to the requirement set forth in section 20002(a) that a driver involved in an accident resulting in damage to property must stop and identify himself. Accordingly, the decision of the Court below holding that information derived from compliance with section 20002 or its fruits must be barred from use in any criminal proceeding was erroneous. If the privilege against self-incrimination does apply to even the minimal requirement imposed by section 20002 that a driver must stop and identify himself, the state has an overriding and compelling state interest both in demanding compliance with the statute and in using the information derived in any criminal prosecution arising from the accident. Accordingly, we respectfully submit that it was not unfair to charge the respondent Byers with failure to stop at the scene of the accident in violation of section 20002 and that the decision of the Court below should therefore be reversed.

Dated: San Francisco, California
June 12, 1970

THOMAS C. LYNCH
Attorney General of the State of California

ALBERT W. HARRIS, JR.
Assistant Attorney General

LOUISE H. RENNE
Deputy Attorney General

Attorneys for Petitioner

(Appendix Follows)

Appendix

UNITED STATES CONSTITUTION

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA VEHICLE CODE

Duty Where Property Damaged

20002. (a) The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either:

(1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, or;

(2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol.

Any person failing to stop or comply with said requirements is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not to exceed six months or by a fine of not to exceed five hundred dollars ($500) or by both.
(Stats. 1965, ch. 872, § 3)

§ 21750. Overtake and Pass to Left. The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe operation of the overtaken vehicle, subject to the limitations and exceptions hereinafter stated. [Amended by Stats. 1961 ch. 577 § 1.]

UNIFORM VEHICLE CODE

§ 10-101—Provisions of chapter apply throughout State

The provisions of this chapter shall apply upon highways and elsewhere throughout the State.

§ 10-102—Accidents involving death or personal injury

(a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as

close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of § 10-104. Every such stop shall be made without obstructing traffic more than is necessary.

(b) Any person failing to stop or to comply with said requirements under such circumstances shall, upon conviction, be punished by imprisonment for not less than 30 days nor more than one year or by fine of not less than $100 nor more than $5,000, or by both such fine and imprisonment.

(c) The commissioner shall revoke the license or permit to drive and any nonresident operating privilege of the person so convicted.

§ 10-103—Accidents involving damage to vehicle or property

The driver of any vehicle involved in an accident resulting only in damage to a vehicle or other property which is driven or attended by any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible, but shall forthwith return to and in every event shall remain at the scene of such accident until he has fulfilled the requirements of § 10-104. Every such stop shall be made without obstructing traffic more than is necessary. Any person failing to stop or comply with said requirements under such circumstances shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided in § 17-101. (REVISED 1962.)

§ 10-104—Duty to give information and render aid

(a) The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle or other property which is driven or attended by any person shall give his name, address and the registration number of the vehicle he is driving, and shall upon

request and if available exhibit his license or permit to drive to any person injured in such accident or to the driver or occupant of or person attending any vehicle or other property damaged in such accident and shall give such information and upon request exhibit such license or permit to any police officer at the scene of the accident or who is investigating the accident and shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary, or if such carrying is requested by the injured person.

(b) In the event that none of the persons specified are in condition to receive the information to which they otherwise would be entitled under subdivision (a) of this section and no police officer is present, the driver of any vehicle involved in such accident after fulfilling all other requirements of § 10-102 and subdivision (a) of this section, insofar as possible on his part to be performed, shall forthwith report such accident to the nearest office of a duly authorized police authority and submit thereto the information specified in subdivision (a) of this section. (SECTION REVISED 1962.)

§ 10-105—Duty upon damaging unattended vehicle or other property

The driver of any vehicle which collides with or is involved in an accident with any vehicle or other property which is unattended resulting in any damage to such other vehicle or property shall immediately stop and shall then and there either locate and notify the operator or owner of such vehicle or other property of his name, address and the registration number of the vehicle he is driving or shall attach securely in a conspicuous place in or on such vehicle or other property a written notice giving his name, address and the registration number of the vehicle he is driving and shall without unnecessary delay notify the nearest office of a duly authorized police authority. Every such stop shall be made wihtout obstructing traffic more than is necessary. (REVISED, 1968.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 75

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

JONATHAN TODD BYERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR THE RESPONDENT

JOHN W. POULOS
School of Law
University of California
Davis, California 95616
Telephone: (916) 752-2881
Attorney for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 75

THE PEOPLE OF THE STATE OF CALIFORNIA,

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JONATHAN TODD BYERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. Does California Vehicle Code Section 20002(a), which requires a driver involved in an automobile accident resulting in property damage to stop at the scene and identify himself as the driver, when the accident giving rise to the statutory obligation was caused by criminal conduct of the driver, violate the driver's privilege against self-

incrimination secured to him by the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Assuming that the answer to the preceding question is in the affirmative, whether restrictions may be imposed upon the use of the information required to be divulged by California Vehicle Code Section 20002(a) so as to ultimately sustain the constitutionality of that statute.

STATEMENT OF THE CASE

A. THE UNDERLYING FACTS[1]

On August 20, 1966 Respondent Byers was driving a car and while in the process of overtaking another vehicle proceeding in the same direction, he failed to pass to the left at a safe distance as required by section 21750 of the California Vehicle Code.[2] (A. 48-49) As a result of his failure to pass to the left at a safe distance, there was a collision between the vehicle driven by Respondent Byers and the vehicle being overtaken which caused property damage. (A. 48-49) Byers did not stop at the scene of the accident and comply with California Vehicle Code Section 20002(a).[3] (A. 48-49)

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[1]The following statement is based upon the inferences reasonably drawn from the record below. Since a demurrer to the complaint was interposed below for the purpose of this action, the facts alleged in the criminal complaint may be taken to be true.

[2]Section 21750 provides: "The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe operation of the overtaken vehicle, subject to the limitations and exceptions hereinafter stated."

[3]At the time of the accident, section 20002, subdivision (a) provided: "The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either: (1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle

B. PROCEEDINGS IN THE JUSTICE COURT FOR THE UKIAH JUDICIAL DISTRICT.

Two days later, on August 22, 1966, a two-count criminal complaint was filed in the Justice Court for the Ukiah Judicial District, Mendocino County, California, charging the respondent Jonathan Todd Byers with two misdemeanor violations of the California Vehicle Code. Count one of the complaint charged Byers with improper and unsafe driving in violation of section 21750 of the California Vehicle Code. Count two charged that he violated section 20002(a) of the California Vehicle Code (failure to stop at the scene of an accident resulting in property damage) (A. 7, 12-13).

Byers filed a demurrer to Count two of the complaint (A. 14-17). He claimed, *inter alia*, that section 20002(a) was unconstitutional on its face and as applied to him because it violated the privilege against self-incrimination guaranteed by both the federal and state constitutions. (A. 8, 14-17). It was stipulated by counsel that both charges contained in the complaint arose from the same accident (A. 8-9). On December 7, 1966, the Justice Court overruled the demurrer (A. 8-9).

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involved, or; (2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol. Any person failing to stop or to comply with said requirements is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not to exceed six months or by a fine of not to exceed five hundred dollars ($500) or by both."

In 1967 this section was amended in several minor respects not pertinent to this case.

C. PROCEEDINGS IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF MENDOCINO

On January 13, 1967, Byers filed a petition for writ of prohibition in the Mendocino County Superior Court (A. 7-25). In the Superior Court Byers again urged that the privilege against self-incrimination barred his prosecution under Count two. He contended that compliance with the "hit-run" provisions of California Vehicle Code Section 20002(a) violated the privilege against self-incrimination when he was also charged with another criminal offense arising from the same accident (A. 9). On February 17, 1967, the Superior Court issued an opinion granting the writ of prohibition sought by Byers (A. 36-45). The Court held that section 20002(a) could not be applied against Byers without violating the privilege against self-incrimination under the Fifth Amendment of the Constitution of the United States.

In the granting of the writ of prohibition in the California Superior Court, the Court, in its findings of fact, found as follows:

> "The alleged violation of Vehicle Code Section 21750 as alleged in Count I of said complaint resulted in an impact between the vehicle driven by the Petitioner and another vehicle which caused property damage and that the damage from this impact was the resulting injury to property alleged in Count II of said complaint." (A. 49)

Accordingly, on March 21, 1967, the Court issued a Permanent Writ of Prohibition to restrain further proceedings in the Justice Court on Count two of the Complaint (A. 3, 54-55).

D. PROCEEDINGS IN THE CALIFORNIA COURT OF APPEAL

On March 2, 1967 a notice of appeal was filed in the California Court of Appeal (A. 57). The Court of Appeal reversed the decision of the Superior Court and held that enforcement of the "hit-run" statute against Byers was not

barred.[4] However, in reaching that decision, the Court of Appeal held that the Fifth Amendment privilege against self-incrimination was infringed by a requirement that a driver involved in an accident must stop and identify himself in any case where he was later charged with a criminal offense arising from the accident. The rationale of the Appellate Court's decision was that compliance with section 20002(a) would require Byers to admit that he was the driver who passed unsafely in violation of section 21750. Nevertheless, the Court of Appeal also held that compliance with section 20002(a) could be constitutionally justified if admissions made in compliance with the statute were not later used in evidence. Accordingly, by adoption of the theory of restriction of use, the Court upheld enforcement of the statute.

E. PROCEEDINGS IN THE CALIFORNIA SUPREME COURT.

Both the People of the State of California and the respondent Byers filed a Petition for Hearing in the California Supreme Court. On November 20, 1968 the Court granted a hearing on the matter. Following the briefing and argument, the California Supreme Court on September 16, 1969 issued its opinion affirming the judgment granting the permanent writ of prohibition entered by the Superior Court in Mendocino County (A. 58-84).

In reaching that decision, the California Supreme Court concluded that the Fifth Amendment privilege against self-incrimination was applicable to the requirements of section 20002(a). The Court stated that:

> "We are satisfied that the privilege is applicable when a driver of a motor vehicle involved in an accident is confronted with a statutory requirement to stop and divulge his identity and reasonably believes

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[4]That opinion which is not reported in the permanent volumes of the Official California reports is nevertheless set forth at 265 A.C.A. 1031, 71 Cal. Rptr. 609 (1968).

that compliance with the stature will result in self-incrimination" (A. 66);

The Court also held that compliance with section 20002(a) could be sustained if no use were made of the required information or its fruits in connection with any criminal proceeding. The Court stated that:

> ". . . we must, in order to fulfill our responsibility to protect the privilege against self-incrimination, hold that where compliance with section 20002 of the Vehicle Code would otherwise be excused by an assertion of the privilege, compliance is, as in other cases, mandatory and state prosecuting authorities are precluded from using the information disclosed as a result of compliance or its fruits in connection with any criminal prosecution related to the accident." (A. 79)

Since judicially-created restrictions on use were a "doctrine new to California's jurisprudence" (A. 80), being created by the Supreme Court's decision in this very case for this first time, the California Supreme Court affirmed the judgment of the trial court below, saying:

> "We conclude . . . that it would be unfair to hold that although Byers correctly asserted that the Fifth Amendment privilege was applicable to the question of his compliance with the "hit-and-run" statute he should have complied because of use-restrictions which he could only have speculated might exist." (A. 81-82)

SUMMARY OF ARGUMENT

I

The only statute here in question is California Vehicle Code Section 20002(a) and the sole purpose of that section is to protect property owners from financial loss by requiring drivers involved in accidents resulting in property damage to disclose the name and address of the driver and

owner of the offending vehicle (A. 68). Thus, the only state interest involved with section 20002(a) is that of helping citizens to avoid financial loss as a result of property being damaged by some unknown person. Section 20002(a) does not seek to promote "highway safety" or protect persons injured in automobile accidents.

Two non-California post-*Malloy v. Hogan*, 378 U.S. 1 (1964), cases are cited by the Attorney General of California, *State v. Lemme*, 244 A.2d 585 (Supreme Court of R.I. - 1968), and *People v. Lucus*, 41 Ill. 2d 370, 243 N.E. 2d 228 (1968), as upholding the Rhode Island and Illinois "hit-and-run" statutes there in question against the contention that they violated the Fifth Amendment privilege against self-incrimination. Both cases are factually distinguishable from the case at bar. In neither case was the defendant either charged with or convicted of any other offense in connection with the accident which gave rise to his statutory duty to identify himself as the driver of the vehicle involved. In the case at bar, a violation of California Vehicle Code Section 21750 (failure to pass to the left at a safe distance) by Byers caused the accident which invoked the requirements of section 20002(a) which compelled Byers, on pain of penal sanction, to stop and give the name and address of the driver and owner of the vehicle that he was driving.

II

The Fifth Amendment privilege against self-incrimination provides a person with protection against state as well as federal governmental action, (*Malloy v. Hogan*, 378 U.S. 1 (1964)) whether the governmental action takes the form of questioning by public officials investigating alleged criminal activity (*Malloy v. Hogan, supra*), or a statute which requires the disclosure of self-incriminating information. *Leary v. United States*, 395 U.S. 6, 28 (1969); *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968); *Albertson v. S.A.C.B.*, 382 U.S. 70 (1965).

On August 20, 1966 Byers was driving a car and while in the process of overtaking another vehicle proceeding in the same direction, he failed to pass to the left at a safe distance as required by section 21750 of the California Vehicle Code (A. 48-49). As a result of his failure to pass to the left at a safe distance, (the violation of section 21750), there was a collision between the vehicle driven by Respondent Byers and the vehicle being overtaken. The impact caused property damage (A. 48-49). Byers did not stop at the scene of the accident and comply with California Vehicle Code Section 20002(a) (A. 48-49). Two days later, on August 22, 1966, a two count criminal complaint was filed against Byers charging him with a violation of section 21750 and 20002(a) of the California Vehicle Code.

Section 20002(a), as construed by the California Supreme Court below, requires the driver of an automobile involved in an accident resulting in property damage to stop at the scene of the accident and give the name and address of the driver and owner of the vehicle involved to the owner or person in charge of the damaged property (A. 58, 59, 63, 64).

Section 20002(a) would thus compel Byers, as the driver of an automobile involved in an accident resulting in property damage, to stop at the scene of the accident which was *caused* by his alleged violation of section 21750 and give the name and address of the driver of the car. Since section 21750 requires "*the driver*" to pass to the left at a safe distance and since section 20002(a) required Byers, as the driver to stop at the scene and give the driver's name and address (*his* name and address) section 20002(a) required Byers to stop at the scene and communicate information which would actually prove one of the elements of the offense defined by section 21750. Since section 21750 requires the driver to pass to the left at a safe distance, the identity of the driver is crucial in every prosecution under that section and forms one of the elements of the crime.

Upon Byers' failure to pass to the left at a safe distance thus causing the accident resulting in property damage, Byers was faced with the choice of self-incrimination by complying with section 20002(a) or failing to comply with 20002(a) thereby avoiding incriminating himself under section 21750 but committing the crime defined by section 20002(a) by failing to provide the required information. California has thus presented Byers with the proverbial choice between "the rock and the whirlpool" - either incriminate himself (under section 21750) or commit a crime for failing to do so (a violation of section 20002(a)). Under this Court's decisions in *Leary v. United States, supra,* 395 U.S. 6 (1969); *Marchetti v. United States, supra,* 390 U.S. 39 (1968); *Grosso v. United States, supra,* 390 U.S. 62 (1968); *Haynes v. United States, supra,* 390 U.S. 85 (1968); and *Albertson v. SACB, supra,* 382 U.S. 70 (1965), California may not so abridge Byers' Fifth Amendment privilege against self-incrimination. The dilemma which confronted Byers–either incriminate himself under section 21750 or commit the crime defined by section 20002(a) for failing to do so is precisely what the Fifth Amendment prohibits under the Court's holdings in *Leary, Marchetti, Grosso, Haynes* and *Albertson. Minor v. United States,* 396 U.S. 87, 92-93 (1969); *Toussie v. United States,* 397 U.S. 112, 133-134 (1970) (Dissenting Opinion of Mr. Justice White - dictum). Accordingly, the California Supreme Court quite correctly relied upon *Marchetti, Grosso* and *Haynes* and held that the privilege against self-incrimination is applicable when a driver of a motor vehicle involved in an accident is confronted with a statutory requirement to stop, and divulge the name and address of the driver of the automobile, which is, of course, his name and address, and reasonably believes that compliance with the statute will result in self-incrimination (A. 66).

The argument that compliance with section 20002(a) did not constitute a substantial hazard of self-incrimination is not well taken. It is difficult to imagine a case where the hazard of self-incrimination is more real and apparent than

in the case at bar where criminal conduct on the part of Byers (the violation of section 21750) *caused* section 20002(a) (the "hit-and-run" property damage statute) to be applicable and where compliance with section 20002(a) would have required Byers to communicate to a third person the fact that he was the driver of the offending vehicle, one of the facts that the prosecution must prove to establish his guilt under section 21750. The substantiality of the hazard of self-incrimination to Byers is further reflected by the fact that the accident happened on August 20, 1966 and the criminal complaint charging violation of both sections 21750 and 20002(a) was filed only two days later on August 22, 1966 (A. 12-13, 48-49).

Likewise, the argument that section 20002(a) requires non-testimonial information is specious. Section 20002(a) requires either a written or verbal communication by the driver of the automobile giving the name and address of the driver and owner of the automobile in question. Section 20002(a) thus does not merely require a citizen to stop and identify himself, but it requires him to stop and communicate the name and address of the driver and owner of the vehicle in question. Under the facts of the case at bar, compelling such information from Byers would have resulted in his incriminating himself under section 21750.

III

The California Supreme Court in its decision below did not extend the *Albertson - Marchetti - Grosso - Haynes & Leary* cases, but correctly applied those decisions to the case at bar.

The law pertaining to the driving of motor vehicles upon the highways of California is an area "permeated with criminal statutes." Indeed the area of driving an automobile in California is more "permeated" with criminal statutes than was the area covered by Sections 5841 and 5851 of the National Firearms Act and yet this Court held in *Haynes*, that it was an "area permeated with criminal sta-

tutes." *Haynes v. United States,* 390 U.S. 85, 97 ftn. 11, p. 99 (1968). Comparing the statutes on firearms which this Court faced in *Haynes* with the vastly greater numbers of statutes dealing with the driving of motor vehicles, the conclusion is compelled that this is, indeed, "an area permeated with criminal statutes."

Likewise, the argument that section 20002(a) is not directed at persons "inherently suspect of crime" is not well taken. The California Supreme Court in its decision below held,

> ". . . although not all drivers involved in accidents are lawbreakers, there is a substantial correlation between being a driver involved in an accident and being a driver who has contemporaneously violated one or more vehicle laws . . . (A. 64)
>
> Although the group subject to "hit-and-run" statutes "*i.e.,* section 20002(a)], drivers involved in accidents, is not inherently suspect of criminal activities to the same extent as the groups regulated by the statutes in *Marchetti, Grosso,* and *Haynes,* there is in the accident cases, unlike the situation in *Shapiro,* a substantial shadow of suspicion cast upon the persons regulated by the statute." . . . (A. 64)

Thus the California Supreme Court has held that section 20002(a) is aimed at a "suspect group" inherently suspect of criminal activity (A. 64).

The above holding may be considered to be conclusive for the California Supreme Court is the final arbiter of its local laws and the facts on which the Court founded its judgment are controlling. *General Trading Co. v. State Tax Comm'n.,* 322 U.S. 335, 337 (1944). The conclusion of the California Supreme Court construing section 20002(a) and its relationship with other California penal statutes and its conclusion concerning the effects of the statute in California fall within the concept of "state law" and are therefore conclusive here. Even if these holdings are not considered conclusive, the decision of the California Supreme Court is both persuasive and correct.

IV

United States v. Sullivan, 274 U.S. 259 (1927) is not applicable to the case at bar for the same reasons that it was inapplicable to *Albertson, Marchetti, Grosso, Haynes* and *Leary*.

The case at bar is completely distinguishable from *Sullivan* in that "every portion" (*albeit*, section 20002(a) has essentially only *one* "portion") of section 20002 is self-incriminating whereas most, if not all, of the Federal Income Tax law is not self-incriminating. In this regard section 20002 is like the federal wagering tax act involved in *Marchetti* and *Grosso*, and is unlike the federal income tax provisions upheld in *Sullivan*.

Not only is the case at bar distinguishable from *Sullivan*, but it is also consistent with the suggestion made by this Court in *Sullivan* that if the Federal income tax return required self-incrimination, that the privilege could be claimed in the return to the specific self-incriminating disclosure required by the return. *United States v. Sullivan, supra*, 274 U.S. 259, 263 (1927). Since not every portion of the federal income tax return compelled self-incrimination, Sullivan was not privileged to fail to make a return. *United States v. Sullivan, supra* at 263-264. Just as Sullivan would have been privileged to fail to answer specific incriminating questions contained in the return, so Byers was privileged not to incriminate himself when required to do so. The crucial difference here between *Sullivan* and the case at bar is that not all of the information required from Sullivan was self-incriminating whereas all of the information compelled from Byers was self-incriminating.

V

For exactly the same reasons discussed by this Court in *Marchetti v. United States*, 390 U.S. 39, 57 (1968), the case at bar does not come within the purview of the "required records doctrine" of *Shapiro v. United States*, 335 U.S. 1 (1948).

VI

The Attorney General of California suggests that a balancing formula be used by this Court in order to determine whether the Fifth Amendment has been abridged in this case. No case is cited by the Attorney General of California which indicates that this Court has ever been willing to approach the Fifth Amendment privilege against self-incrimination in this manner. No weighing or balancing test has ever been used in applying the Fifth Amendment by this Court in any case that we could find. Once it is found that the privilege against self-incrimination does apply, the prohibition against violation of the privilege by compelling self-incrimination is absolute. It is precisely in the area where the state's interest is a full disclosure is the most compelling, that the Fifth Amendment privilege against self-incrimination has its most vital meaning. Thus, a balancing formula can have no application to cases involving the Fifth Amendment privilege, if that privilege is to continue as a meaningful right of all Americans.

The California Supreme Court held that section 20002(a), without more, violated Respondent Byers' Fifth Amendment privilege against self-incrimination under the facts of this case (A. 66), but in order to make the information available for the protection of private property, the California Supreme Court judicially created use restrictions (A. 70).

Having first found that, without more, section 20002(a) abridged Byers' Fifth Amendment privilege against self-incrimination, the California Supreme Court could only hold either that the Fifth Amendment constituted a complete defense or create restrictions on the use of the information sufficient to protect Respondent Byers' privilege against self-incrimination. As a matter of Federal Constitutional law, no other choice was available to the California Supreme Court once the conclusion was reached that section 20002(a) abridged Byers' Fifth Amendment privilege.

See, e.g., Murphy v. Waterfront Commission, supra, 378 U.S. 52, 79 (1964); *Albertson v. SACB, supra,* 382 U.S. 70, 79-81 (1965); *Marchetti v. United States, supra,* 390 U.S. 39, 60 (1968).

The constitutional inquiry begins with the determination that the statute in question abridges the Fifth Amendment privilege against self-incrimination and ends with an assessment of the use restrictions imposed for the purposes of determining whether they are adequate to afford "complete protection from all the perils against which the constitutional prohibition was designed to guard." *Albertson v. SACB, supra,* 382 U.S. 70, 80 (1965).

Since the use restrictions imposed by the California Supreme Court preclude prosecuting authorities from using information divulged in compliance with section 20002 together with the "fruits" of such information, we concede that the use restrictions adequately protect Respondent Byers' Fifth Amendment privilege against self-incrimination. The touchstone of validity of use restrictions is the Respondent Byers' Fifth Amendment privilege, and since he concedes it to be adequately protected by the use restrictions judicially created by the California Supreme Court below, this should end the inquiry.

The Attorney General of California argues that the use restrictions imposed by the California Supreme Court below make the state's ability to enforce its criminal laws difficult, if not impossible (Brief for the Petitioner, p. 25).

Once it is concluded that a statute violates a citizen's Fifth Amendment privilege, the particular court must find either that the Fifth Amendment constitutes a complete defense to a prosecution under the statute for failure to divulge the required information or create use restrictions adequate to protect the citizen's Fifth Amendment privilege. The only Federal Constitutional aspects of the problem are the initial determinations as to whether the use restrictions if any have been created, are adequate to protect the Fifth Amendment privilege.

The decision to impose use restrictions rather than to hold the Fifth Amendment to be a complete defense, once the Court has found that the statute violates the Fifth Amendment privilege, is a matter of *state law* and not federal constitutional law.

The decision as to which of these two constitutionally adequate alternatives would be used in this case was a matter of the law of the State of California and is not reviewable by this Court. The determination of this issue revolves around the intent of the California Legislature in enacting section 20002 (A. 75-76) and assessing the impact of use restrictions in California upon criminal prosecution of drivers involved in accidents resulting in damage to the property of others (A. 75), both of which are issues in which the Supreme Court of California is the final arbiter.

The California Supreme Court held that use restrictions would not unduly hamper criminal prosecutions in California (A. 75) and that the creation of use restrictions comported with the probable legislative intent of the California Legislature (A. 77).

The Brief for the Petitioner, insofar as it argues that the creation of the use restrictions "made the state's ability to enforce its criminal laws difficult, if not impossible" (Brief for the Petitioner, pp. 24-25) presents no constitutional argument to this Court.

VII

The case before the California Supreme Court below was an appeal by the People from a judgment granting Respondent Byers' petition for a writ of prohibition which judgment prohibited the state from prosecuting Byers under California Vehicle Code Section 20002(a) upon the theory that section 20002(a) violated Byers' Fifth Amendment privilege against self-incrimination. (A. 57, 59, 79-80)

The California Supreme Court held (1) that without consideration of the imposition of use restrictions, section 20002(a) did violate Respondent Byers' Fifth Amendment privilege, but (2) since the California Supreme Court, for the first time in the judicial history of California, judicially created use restrictions which adequately protected Respondent Byers' Fifth Amendment privilege, that Respondent Byers was required to comply with the provision of section 20002(a). (A. 79-81)

A Court more taken with classical theory than with the realities of the world would have reversed the judgment, for classical theory would have found that although the use restrictions were judicially created for the first time in this very appeal, the Court merely "discovered" existing law that existed at the time Byers refused to comply with section 20002 and therefore he was incorrect and could have been punished for his failure to comply.

The California Supreme Court, recognizing that ". . . we here announce a doctrine new to this state's jurisprudence . . ." (A. 80) *affirmed* the judgment saying ". . . it would be unfair to hold that although Byers correctly asserted that the Fifth Amendment privilege was applicable to the question of his compliance with the "hit-and-run" statute he should have complied because of use-restrictions which he could only have speculated might exist." (A. 81-82)

If this Court holds that the California Supreme Court is incorrect in its holding that section 20002(a) violates Respondent Byers' Fifth Amendment privilege, *a fortiori* Byers cannot, with "fairness" be punished for having "correctly asserted", according to all of the justices of the state Supreme Court, that the Fifth Amendment privilege was applicable. Since all of the justices of the state's highest court agreed with Byers that the Fifth Amendment privilege was applicable to the question of his compliance with section 20002, at most he is guilty of bad constitutional jurisprudence, but not of crime. Fairness demands no less than affirmance.

ARGUMENT

I. THE ONLY STATUTE HERE IN QUESTION IS CALIFORNIA VEHICLE CODE SECTION 20002(a) AND THE SOLE PURPOSE OF THAT SECTION IS TO PROTECT PROPERTY OWNERS FROM FINANCIAL LOSS.

The only statute here in question is California Vehicle Code Section 20002(a). The sole purpose of section 20002 is to protect property owners from financial loss by requiring drivers involved in accidents resulting in property damage to disclose the name and address of the driver and owner of the offending vehicle (A. 68). See also: *People v. Stansberry*, 242 Cal. App. 2d. 199, 203, 51 Cal. Rptr. 403 (1966); *Miglierini v. Havemann*, 240 Cal. App. 2d 570, 573, 49 Cal. Rptr. 795 (1966). Section 20002, the California "hit-and-run property damage" statute, must be contrasted with California Vehicle Code Section 20001,[5] the California "hit-and-run personal injury" statute. The crucial distinction between the two statutes is that the "hit-and-run personal injury" statute additionally requires the driver to stop and render reasonable assistance to any person injured in the accident. The legislative purpose in enacting section 20001 was to prevent the driver of the offending car from leaving the scene of the accident without furnishing the information as to the identity of the driver and owner of the offending vehicle and without rendering necessary aid to the injured person. *Bailey v. Superior Court*, 4 Cal. App. 3d 513, 519, 84 Cal. Rptr. 436 (1970); *People v. Scofield*, 203 Cal. 703, 707-708, 265 P. 914 (1928).

The Attorney General of California fails to recognize the distinction between sections 20002 and 20001 and simply refers to "hit-and-run" statutes in the first portion of the argument (see Brief for the Petitioner 10-13).

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[5]The text of section 20001 and supporting sections is set forth in the appendix to this brief.

Since the decision in this case by the California Supreme Court, the California Court of Appeal has held that insofar as section 20001 requires the furnishing of information it is similar in its requirement and in its purpose to section 20002(a), and that the rules set forth in *Byers v. Superior Court* (the California Supreme Court opinion below) are controlling, but that the portion of section 20001 which requires the driver of a vehicle to stop and render assistance is severable for purposes of determining the applicability of the privilege against self-incrimination. They further held that since the rendering of assistance does not compel incriminating disclosures, the Fifth Amendment has no application to that portion of section 20001 which requires the driver to stop at the scene of the accident involving personal injuries and render assistance to the injured person. *Bailey v. Superior Court*, 4 Cal. App. 3d 513, 519-523, 84 Cal. Rptr. 436 (1970).

As of this date, in California, all drivers involved in accidents must stop at the scene and comply with the requirements of the appropriate "hit-and-run" statute. With respect to the compelled information which is self-incriminating, the restrictions on use created by the California Supreme Court in its opinion below, preclude the use of the compelled information or its fruits in subsequent prosecutions by the prosecuting authorities. If the accident involves personal injuries, the adverse driver must render assistance to the injured person. The decision below has ultimately resulted in an accommodation between the privilege against self-incrimination and the interests of the State of California in protecting persons and property against harm and loss. In reaching this accommodation, the California Supreme Court correctly applied the Fifth Amendment privilege to the facts of the case at bar.

The various pre-*Malloy v. Hogan*, 378 U.S. 1 (1964) state court decisions upholding various "hit-and-run" statutes against attack upon the basis of state law cited by the Attorney General of California (Brief for the Petitioner, 11-

12) do not involve the Fifth Amendment privilege against self-incrimination and are therefore not pertinent here.

The two post *Malloy* cases, *State v. Lemme*, 244 A.2d 585 (Supreme Court of R.I. - 1968) and *People v. Lucus*, 41 Ill. 2d 370, 243 N.E. 2d 228 (1968), are both factually distinguishable from the case at bar. In neither *Lemme* nor *Lucus* was the appellant either charged with or convicted of any other offense in connection with the accident which gave rise to his statutory duty to identify himself. Indeed, in *Lemme* the facts appear to indicate that the appellant could not show a fear of self-incrimination under some other Rhode Island statute (244 A.2d 585, 590) and in *Lucus* there is no indication that any such charge would have been warranted (243 N.E. 2d 228, 231). It is not therefore surprising that the courts in those two cases concluded that there was no real or substantial danger that the compelled information would be self-incriminating.

II. SECTION 20002(a) VIOLATES BYERS' FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE FACTS OF THIS CASE.

The Fifth Amendment privilege against self-incrimination provides a person with protection against state as well as federal governmental action, (*Malloy v. Hogan*, 378 U.S. 1 (1964)) whether the governmental action takes the form of questioning by public officials investigating alleged criminal activity (*Malloy v. Hogan, supra*, 378 U.S. 1 (1964)) or a statute which requires the disclosure of self-incriminating information. *Leary v. United States*, 395 U.S. 6, 28 (1969); *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968); *Albertson v. SACB*, 382 U.S. 70 (1965).

If the statute compels the person to incriminate himself, the Fifth Amendment provides a complete defense to a prosecution, under the statute, for failure to comply with its terms. *Leary v. United States, supra*, 395 U.S. 6, 28, 29

(1969); *Marchetti v. United States, supra,* 390 U.S. 39, 60 (1968); *Haynes v. United States, supra,* 390 U.S. 85, 100 (1968).

The statute which compels the information must, of course, compel a "self-incriminating" communication, but the information required need not, without more, support a criminal conviction for it is sufficient if the information compelled by the statute would furnish a link in the chain of evidence needed to prosecute. *United States v. Burr,* 25 Fed. Cas. 38, 40 (No. 14,629e) (C.C. Va. 1807); *Hoffman v. United States,* 341 U.S. 479, 486-7 (1951); *Malloy v. Hogan, supra,* 378 U.S. 1, 11-12 (1964); *Albertson v. SACB, supra,* 382 U.S. 70, 78 (1965); *Marchetti v. United States, supra,* 390 U.S. 39, 48; *Leary v. United States, supra,* 395 U.S. 6, 16 (1969).

Also, though the information compelled by the statute might appear to involve self-incrimination in the abstract, the person must, in fact, be confronted by a "substantial and real," and not a mere "trifling or imaginary," hazard of incrimination. *Leary v. United States, supra,* 395 U.S. 6, 16 (1969); *Marchetti v. United States, supra,* 390 U.S. 39, 53 (1968); *Grosso v. United States, supra,* 390 U.S. 62, 66 (1968); *Haynes v. United States, supra,* 390 U.S. 85, 97 (1968).

Under the circumstances of this case, California Vehicle Code Section 20002(a) compels respondent Byers to give information which would incriminate himself and the danger of self-incrimination is real and substantial and not merely trifling or imaginary.

On August 20, 1966 Respondent Byers was driving a car and while in the process of overtaking another vehicle proceeding in the same direction, he failed to pass to the left at a safe distance as required by section 21750 of the California Vehicle Code (A. 48-49). As a result of his failure to pass to the left at a safe distance, there was a collision between the vehicle driven by Respondent Byers and the vehicle being overtaken. The impact caused property dam-

age. (A. 48-49) Byers did not stop at the scene of the accident and comply with the California Vehicle Code Section 20002(a) (A. 48-49).

On August 22, 1966, a two count criminal complaint was filed in the Justice Court for the Ukiah Judicial District, County of Mendocino, State of California charging Respondent Byers in Count I with a violation of Section 21750 of the California Vehicle Code (failure to pass to the left at a safe distance) and in Count II with a violation of Section 20002(a) of the California Vehicle Code (the California hit-run property damage section) (A. 12-13, 48-49).

By demurrer, filed in the Justice Court, an appropriate California procedure to that end, Respondent Byers challenged the constitutionality of section 20002(a) as applied to him under the circumstances of this case upon the ground that section 20002(a) violated his federally protected Fifth Amendment privilege against self-incrimination (A. 14-15, 50).

Section 20002(a), as construed by the California Supreme Court below, requires the driver of an automobile involved in an accident resulting in property damage to stop at the scene of the accident and give the name and address of the driver and owner of the vehicle involved to the owner or person in charge of the damaged property (A. 58, 59, 63, 64).

Section 20002(a) would thus compel Byers, as the driver of an automobile involved in an accident resulting in property damage, to stop at the scene of the accident which was *caused* by his alleged violation of section 21750 and give the name and address of the driver of the car. Since section 21750 requires *"the driver"* to pass to the left at a safe distance and since section 20002(a) required Byers, as the driver to stop at the scene and give the driver's name and address (*his* name and address) section 20002(a) required Byers to stop at the scene and communicate information which would actually prove one of the elements of the offense defined by section 21750. Since section 21750 re-

quires the driver to pass to the left at a safe distance, the identity of the driver is crucial in every prosecution under that section and forms one of the elements of the crime.

Since section 20002(a) compelled Byers to *communicate* his name and address as being the driver who failed to pass to the left at a safe distance, section 20002(a) required Byers to incriminate himself under section 21750, for the required information was of a "testimonial" nature.[6] The hazard of self-incrimination was real and substantial and not merely trifling or imaginary because it was Byers' failure to pass to the left at a safe distance (the alleged violation of section 21750) that caused the provision of section 20002(a) to become applicable. Upon Byers' failure to pass to the left at a safe distance thus causing the accident resulting in property damage, Byers was faced with the choice of self-incrimination by complying with section 20002(a) or failing to comply with 20002(a) thereby avoiding incriminating himself under section 21750 but committing the crime defined by section 20002(a) by failing to provide the required information. California has thus presented Byers with the proverbial choice between "the rock and the whirlpool" - either incriminate himself (under section 21750) or commit a crime for failing to do so (a violation of section 20002(a)). Under this Court's decisions in *Leary v. United States, supra,* 395 U.S. 6 (1969); *Marchetti v. United States, supra,* 390 U.S. 39 (1968); *Grosso v. United States, supra,* 390 U.S. 62 (1968); *Haynes v. United States, supra,* 390 U.S. 85 (1968); and *Albertson v. SACB, supra,* 382 U.S. 70 (1965), California may not so abridge Byers' Fifth Amendment privilege against self-incrimination. The dilemma which confronted Byers–either incriminate himself under section 21750 or commit the crime defined by section 20002(a) for failing to do so is precisely what the Fifth Amendment prohibits under the Court's holdings in *Leary, Marchetti, Grosso, Haynes* and *Albertson. Minor v. United*

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[6]This requirement is discussed more fully below in this brief at pp. 26-28, *infra.*

States, 396 U.S. 87, 92-93 (1969); *Toussie v. United States*, 397 U.S. 112, 133-134 (1970) (Dissenting Opinion of Mr. Justice White - dictum). Accordingly, the California Supreme Court quite correctly relied upon *Marchetti*, *Grosso* and *Haynes* and held that the privilege against self-incrimination is applicable when a driver of a motor vehicle involved in an accident is confronted with a statutory requirement to stop and divulge the name and address of the driver of the automobile, which is, of course, his name and address, and reasonably believes that compliance with the statute will result in self-incrimination (A. 66).

A. Compliance with Section 20002(a) Did Create a Substantial Hazard of Self-Incrimination for Byers under the Facts of this Case.

We have shown above that the communication sought to be compelled from Byers by section 20002(a) was self-incriminating. In section II.A of California's Brief (Brief for the Petitioner, § II.A., 14-17), it is argued, in substance, that the hazard of self-incrimination placed upon Byers by section 20002(a) was "trifling" or "imaginary." It is difficult to imagine a case in which the hazard of self-incrimination to Byers was more immediate and substantial.

The Attorney General of California argues, in effect, that since section 20002(a) does not require Byers to communicate the required information to an official of the State of California, that the hazards of self-incrimination are not substantial and real. The reasoning appears to be that if the officials learn of the accident, *Miranda v. Arizona*, 384 U.S. 436 (1966) "fully serves to protect against self-incrimination" (Brief for the Petitioner, 15).

While it is true that *Miranda* fully serves to protect Byers against self-incrimination after the "custodial" (384 U.S. 436, 478) stage has been reached, the effect of *Miranda* in this case is simply to prevent *further* self-incrimination–self-incrimination in addition to the incriminating information already compelled from the mouth of Byers by section 20002(a).

Unless the privilege against self-incrimination or the use restrictions are upheld, section 20002(a) effectively requires Byers, as a driver, to be a witness against himself by extracting from him an admission as to the name and address of the driver of the offending vehicle. By compelling this admission, section 20002(a) requires Byers to create admissible evidence for the prosecution by way of an admission of a party opponent. The person to whom the compelled information must be communicated has been made into a prosecution witness, who may be subpoenaed at the trial and compelled to testify to the admission previously made by Byers pursuant to the compulsion of section 20002(a). *Miranda* thus applies to a different point in time and at a different stage in the proceedings and has no application to the case at bar.

The Attorney General of California additionally suggests that Byers did not face a real and substantial risk of incrimination because "in many cases compliance with section 20002(a) may be achieved without any knowledge or involvement by the state." (Brief for the Petitioner, 15) While it is true that this might possibly occur, the fact that an accident does occur almost inevitably results in the police being called to the scene by the owner or person in charge of the damaged property (the identical person who must be notified under the provision of section 20002(a)). Indeed, if the damage to the property exceeds the sum of $200, involved drivers are under a statutory duty in California to report the accident to the California State Department of Motor Vehicles. (California Vehicle Code Section 16000, *et. seq.*; A. 76)

If the property is unattended, the driver of the vehicle must make the incriminating statements directly to the officials of the State of California (section 20002(a)(2)). Thus it is only when attended property is damaged, and the damage is less than $200 and the person in attendance of the property does not voluntarily notify the authorities, that a compliance with section 20002(a) may be achieved

without any knowledge or involvement by the State. These contingencies are so rarely all met that in the great bulk of accidents the authorities are notified. This is generally so also by the fact the property most frequently damaged is another vehicle and the owner or person in charge of the vehicle is most anxious to have the authorities determine that it is not his fault for purposes of adjusting the inevitable insurance claims.

Even if there is a substantial number of cases in which the authorities are never notified of the accident, the likelihood of official detection of crime does not govern the validity of a claim of privilege under the Fifth Amendment. No authority is cited in support of this suggestion. Indeed, by compliance with section 20002(a) the likelihood of detection and prosecution has been greatly increased, for there is now another person who "knows" of the criminal conduct which knowledge is compelled out of the mouth of the "criminal." If this Court holds that a state statute may compel incrimination as long as the compelled incrimination is to a private party, the Fifth Amendment is in danger of complete erosion through ingeniously drawn legislation.

The suggestion that the decision below has extended *Miranda* (Brief for the Petitioner, 15) is simply without foundation in logic or authority. *Miranda* requires the authorities to advise the accused of his Fifth Amendment right to remain silent unless he chooses to speak in unfettered exercise of his own free will only when the "custodial" stage has been reached. The case at bar does not extend *Miranda*, but rather deals exclusively with the statutory abridgment of the Fifth Amendment privilege. The cases operate in completely different orbits. Certainly this case has no more to do with *Miranda*, than do *Leary*, *Marchetti*, *Grosso*, and *Haynes*.

Likewise, the suggestion that the opinion below is "inconsistent" with *Terry v. Ohio*, 392 U.S. 1 (1968) is not well taken (Brief for the Petitioner, 16). *Terry* has nothing

to do with the ability of a state to abridge the Fifth Amendment privilege by statute. If Byers had been stopped at the scene of the accident by a policeman, he might validly be asked his *identity*, but he could not be constitutionally compelled by the policeman to give the name and address of the driver of the offending vehicle. His claim of privilege against self-incrimination could be properly invoked if the policeman, at the scene, had asked Byers who the driver of the car was. While it is true that a person has no constitutional right to anonymity, the California statute in question (section 20002(a)) does not merely require Byers to *identify* himself, but section 20002(a) required Byers, as the driver, to give the *name and address of the driver* of the offending vehicle.

United States v. Sullivan 274 U.S. 259 (1927) is discussed further on in this brief.

B. Section 20002(a) Compels Testimonial Self-Incrimination.

The Attorney General of California retreats from the concession made before the California Court of Appeal. In that Court it was admitted that:

> "While identifying oneself at the scene of an accident is, of course, 'testimonial' in nature since it requires that one's voice be used as more than a 'mere identifying physical characteristic' (albeit 'not to speak his guilt,') *United States v. Wade, supra,* as the Supreme Court also indicated in the *Schmerber* decision, this kind of distinction is but one useful tool for analysis in defining the scope of the privilege, and not intended to be the sole test." *Appellant's* (The People of the State of California) *Opening Brief* before the Court of Appeal of the State of California, First Appellate District, Division Three at p. 16, lines 7-15.

It is now argued that section 20002(a) requires only a "non-testimonial" disclosure (Brief for Petitioner, 17-18), albeit with no case cited to support the contention that in-

criminating evidence compelled from the mouth of the accused is "non-testimonial" in nature.

The cases cited[7] do not deal with compelled communications, but rather with instances in which the suspect or accused was compelled to be the source of "real" or "physical" evidence. Unlike compelling a person to be the source of "real" or "physical" evidence, section 20002(a) requires the driver to "Locate and *notify* the owner or person in charge of such property of the *name and address of the driver* and owner of the vehicle involved . . ." (California Vehicle Code, Section 20002(a)). One cannot "notify" another without some type of communication (usually verbal or in writing) and compelled incriminatory communications are precisely what the Fifth Amendment prohibits. *Gilbert v. California*, 388 U.S. 263, 266 (1967); *Schmerber v. California*, 384 U.S. 757, 761, 761 ftn. 5, 763, 763 ftn. 7 (1966), *McCormick, Evidence* (1954) § 134, p. 283.

Likewise, the California Attorney General incorrectly characterizes section 20002(a) as merely requiring a person to identify himself to another. The above quoted language of section 20002(a) demonstrates that what is required is that the *driver* of the offending vehicle must give the name and address *of the driver* of the offending vehicle. Under the facts of the case at bar section 20002(a) required Byers to stop and communicate the name and address of the driver (his name and address) even though, as seen above, this information would furnish a link in the chain of evidence necessary to prosecute him. One need merely envision the trial of Byers upon Count I of the complaint filed in the Justice Court to see how the compelled communication incriminates him. (Count I alleges the violation of section 21750 (failure of the driver to pass to the left at a safe distance).) (A. 7)

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[7] *Schmerber v. California*, 384 U.S. 757 (1966); *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Peoples v. United States*, 365 F.2d 284 (10th Cir. 1966); *Swingle v. United States*, 151 F.2d 512 (10th Cir. 1945).

If Byers had stopped and complied with section 20002(a) he, as the driver of an involved vehicle, would have had to "notify" (communicate to) "the owner or person in charge" of the damaged property of the "name and address" of the *driver* and owner of the involved vehicle. In short, Byers would have had to communicate to that person that "the driver of the vehicle was JONATHAN TODD BYERS, whose address is . . .". If during the trial, a third person had taken the stand and testified that the driver of the vehicle in question was Jonathan Todd Byers, the testimony so given is clearly incriminating for in order to convict Byers under the charge of violation of section 20002(a) as alleged in Count I of the complaint, the prosecutor would have to prove that Byers was the driver. This he would have done by the testimony of the third person. The vice of section 20002(a) is that it actually compels Byers to be a witness against himself, for if Byers had complied with section 20002(a), the prosecutor would simply call the person notified by Byers pursuant to section 20002(a) and have that person testify as to the fact that Byers told ("communicated" to) him that the driver of the vehicle was, "Jonathan Todd Byers whose address is . . ." This "testimony" from the mouth of Byers would have been admissible in the trial as an admission of a party-opponent. See, *e.g., McCormick, Evidence* (1954) § 239 *et seq.*, pp. 502 *et seq.* Even the most conservative view of the Fifth Amendment admits that this is the very vice that the Fifth Amendment was adopted to prevent. See, *e.g.*, VIII *Wigmore, Evidence*, § 2250, pp. 267-295 (McNaughton's rev. 1961); *Levy, Origins of the Fifth Amendment* pp. 324, 330, 427-28, 430 (Oxford University Press, 1968)

C. Compliance with Section 20002(a) Undermines the Values upon Which the Privilege Against Self-Incrimination Rests.

One may accept the argument that compliance with section 20002 does not undercut the values upon which the privilege against self-incrimination rests (Brief for the Petitioner, 18-19), only if the conclusion is first reached that section 20002 does not itself compel self-incrimination.

The values are well and often stated as requiring, in recognition of the inviolability of the human personality, that the government must produce accusatory evidence and not compel it from the mouth of the accused. See *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

The quotation from *Miranda*, so often used, and here relied upon by California, (Brief for the Petitioner, 19) itself stresses this point and refutes Petitioner's argument. For it is cases exactly like the one at bar where the underlying values demand that a person must be guaranteed the right to remain silent unless he "chooses to speak in the unfettered exercise of his own will." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

The value is that no man must stand convicted unwillingly out of his own mouth and as well said by Mr. Justice Stewart, the privilege against self incrimination arose from the need for "preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'" *Tehan v. Shott*, 382 U.S. 406, 415 (1966); *Accord, Miranda v. Arizona*, 384 U.S. 436, 460 (1966); *Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 55-57 (1964); *Ullmann v. United States*, 350 U.S. 422, 427-28 (1956); *United States v. White*, 322 U.S. 694, 698 (1944); *Bram v. United States*, 168 U.S. 532, 542 (1897); *Boyd v. United States*, 116 U.S. 616, 631-32 (1886); VIII *Wigmore, Evidence* § 2251, p. 317 (McNaughton's rev. 1961); *McKay, Self-Incrimination and The New Privacy*, 1967 Sup. Ct. Rev. 193, 209, 210.

This value lies at the very heart of the American conception of the relationship between a citizen and his government. Any compelled self-incrimination "is contrary to the principles of a free government. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Boyd v. United States,* 116 U.S. 616, 631-32 (1886).

Thus, the privilege against self-incrimination "prevents the debasement of the citizen which would result from compelling him to 'accuse' himself before the power of the state. The roots of the privilege are deeper than the rack and the screw . . . [t]hey go to the nature of a free man and his relationship to the state." *United States v. Wade,* 388 U.S. 218, 261 (Opinion of Mr. Justice Fortas) (1967).

If California is permitted to compel self-incriminatory evidence from the mouth of Byers by the simple expedient of a statute (Section 20002), it will not only subvert one of the values underlying the Fifth Amendment privilege, but also a value which is fundamental to our conception of the relationship between an American and his government. (See, *Levy, Origins of the Fifth Amendment,* p. 431 (Oxford University Press, 1968))

The argument that the values underlying the Fifth Amendment are not infringed because section 20002(a) requires self-incrimination only "on the spot" is not persuasive. Neither the locale nor the timing of compelled self-incrimination is of any importance. The argument that the information compelled is "so general in nature" relies upon the same misconstruction of section 20002(a) as has appeared elsewhere in the Brief for the Petitioner.

Section 20002(a) does not merely require a person to identify himself, but it requires the driver of the offending vehicle to communicate the name and address of the driver of the vehicle, a very specific piece of evidence which certainly provides the prosecution with a link in the chain of evidence necessary to convict. Under the facts of the case

at bar, since it was a violation of section 21750 (failure of a driver to pass to the left safely) which caused the accident that triggered the application of section 20002(a), if Byers had stopped at the scene and communicated the *name and address of the driver,* he would have been compelled to give evidence from his own mouth which would, at least, provide a link in the chain of evidence necessary to convict him under section 21750.

The arguments set forth in the last half of p. 19 and the first half of p. 20 of the Brief for the Petitioner are answered in the section of this brief below dealing with the restrictions on use imposed by the California Supreme Court.

III. THE CALIFORNIA SUPREME COURT IN ITS DECISION DID NOT EXTEND THE ALBERTSON-MARCHETTI-GROSSO-HAYNES & LEARY CASES, BUT APPLIED THEM TO THE CASE AT BAR.

The law pertaining to the driving of motor vehicles upon the highways of California is an area "permeated with criminal statutes".[8] The appendix lists California penal statutes

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[8]A partial list of penal statutes regulating the use of California Highways is set forth in the appendix to this brief. The sections were not reproduced because of the expense that would entail.

The suggestion by the Attorney General of California that many of these statutes are not "penal" in nature, but constitute only "infractions" is both unwarranted and inconclusive (see Brief for the Petitioner, p. 22). It is unwarranted because both at the time of Byers' failure to comply with section 20002(a), and at the time he was prosecuted (August 20, 1966 and August 22, 1966, respectively), California Vehicle Code § 40,000 made any violation of the California Vehicle Code a misdemeanor, unless the violation was expressly declared to be a felony or a public offense which is punishable either as a felony or misdemeanor. The concept of "infractions" was introduced into the California Vehicle Code in 1968, which by express provision was to become effective January 1, 1969. See California Stats. 1968 Ch. 1192 § 10.5.

The suggestion is inconclusive for the reason that it is yet undetermined whether "self-incrimination" of an "infraction" violates the Fifth Amendment privilege against self-incrimination.

in effect at the time of the incident here in question. Indeed the area of driving an automobile in California is more "permeated" with criminal statutes than was the area covered by Sections 5841 and 5851 of the National Firearms Act and yet this Court held in *Haynes*, that it was "an area permeated with criminal statutes." *Haynes v. United States*, 390 U.S. 85, 97 ftn. 11, p. 99 (1968). Comparing the statutes on firearms which this Court faced in *Haynes* with the vastly greater numbers of statutes dealing with the driving of motor vehicles, the conclusion is compelled that this is, indeed, "an area permeated with criminal statutes."

Likewise, the argument that section 20002(a) is not directed at persons "inherently suspect of crime" is not well taken. The California Supreme Court in its decision below held,

> ". . . although not all drivers involved in accidents are lawbreakers, there is a substantial correlation between being a driver involved in an accident and being a driver who has contemporaneously violated one or more vehicle laws . . . (A. 64)
>
> Although the group subject to "hit-and-run" statutes [*i.e.*, section 20002(a)][9], drivers involved in accidents, is not inherently suspect of criminal activities to the same extent as the groups regulated by the statutes in *Marchetti*, *Grosso*, and *Haynes*, there is in the accident cases, unlike the situation in *Shapiro*, a substantial shadow of suspicion cast upon the persons regulated by the statute." . . . (A. 64)

Thus the California Supreme Court has held that section 20002(a) is aimed at a "suspect group" inherently suspect of criminal activity (A. 64).

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[9]Added for the purpose of clarity by counsel.

A. This Court is Bound by the California Supreme Court's Interpretation.

It should be noted that the phrases, "select group" and "inherently suspect of crime" are relative terms requiring the Court to assay the facts and construe the statute in question. Thus in *Haynes v. United States, supra,* 390 U.S. 85 (1968), this Court interpreted the provision of the National Firearms Act there in question and found the operative facts to be such that even though there existed circumstances, termed "uncommon", where registration would not be self-incriminatory, the Court concluded that the statutes there in question were "directed at a highly selective group inherently suspect of criminal activities." *Haynes, supra,* at 96-98.

In reaching this conclusion this Court said, "Nonetheless, the correlation between obligations to register and violations can only be regarded as exceedingly high, and a prospective registrant realistically can expect that registration will substantially increase the likelihood of his prosecution." *Haynes, supra,* at 97.

In *Leary v. United States,* 395 U.S. 6 (1969) this Court construed the provision of the federal Marijuana Tax Act. In that case, the Court assayed the factual context in which the act operated, and even though under the provision of the act as so construed the act might not compel self-incrimination because of exceptions in state law making possession of marijuana legal, this Court found that ". . . the class of possessors who were both unregistered and obliged to obtain an order form constituted a 'selective group inherently suspect of criminal activities.' . . ." (*Leary, supra,* at 18). In reaching this finding, this Court said, "It is extremely unlikely that such persons will remain unregistered, for failure to register renders them liable not only to an additional $99 per ounce transfer tax but also to severe criminal penalties." (*Leary, supra,* at 17-18). Since *Albertson, Marchetti, Grosso, Haynes* and *Leary* dealt with self-incrimination under Federal statutes, this Court was at lib-

erty to construe the federal statutes and their relationship with other federal statutes and find the operative facts.

But this is not a federal statute. The California Supreme Court is the final arbiter of "its local laws and the facts on which it founded its judgment are of course controlling here." *General Trading Co. v. State Tax Comm'n.*, 322 U.S. 335, 337 (1944); *Scripto v. Carson*, 362 U.S. 207, 210 (1960); *American Railway Express Company v. Kentucky*, 273 U.S. 269, 272 (1927); *Murdock v. City of Memphis*, 20 Wall. 590, 626, 631, 632-633, 87 U.S. 590 (1875); *Wright, Law of Federal Courts*, § 107, p. 488 (2nd Ed. 1970). The conclusion of the California Supreme Court construing section 20002(a) and its relationship with other California penal statutes and its conclusion concerning the effects of the statute in California fall within the purview of the rules announced in the cases cited immediately above.

B. Even if this Court Is Not Bound by the California Supreme Court's Judgment Below Concerning California State Law, It's Decision Is Persuasive, and It Is Correct.

1. *The Decision of the California Supreme Court Below Is Persuasive*

Even if the decision by the California Supreme Court below concerning the construction of section 20002(a) in relationship with other California penal statutes and the factual orbit in which they revolve is not binding on this Court, that judgment is persuasive. As seen by the above quoted passages from *Haynes* and *Leary* the determination of whether a particular statute is aimed at a "selective group inherently suspect of criminal activities" is a relative determination requiring a court to measure the "likelihood" of self-incrimination (see *Leary v. United States, supra*, 395 U.S. 6, 18 (1969)) or, as in *Haynes*, to measure and weigh the "correlation" between the statutory obligation to di-

vulge information and "violations." *Haynes v. United States, supra,* 390 U.S. 85, 97 (1968). Thus in *Haynes* this Court measured and weighed the correlation and concluded that it was "exceedingly high." (*Haynes v. United States, supra,* at 97). The California Supreme Court is in a much more advantageous position to measure and weigh the correlation between the information required to be divulged by section 20002 and violations of other California State penal statutes. Because of this advantageous position and because of the California Supreme Court's peculiar position to know and measure such matters dealing with the law of California, the California Supreme Court's judgment below that,

> ". . . there is a substantial correlation between being a driver involved in an accident and being a driver who has contemporaneously violated one or more vehicle laws." (A. 64)

is very persuasive.

2. *The Decision of the California Supreme Court Below Is Correct.*

Not only is that judgment persuasive, it is correct. An examination of the vehicle code provisions listed in the appendix to this brief compels the conclusion that it would no doubt be the "uncommon" accident in which one or both of the drivers had not violated one or more of the numerous California vehicle code penal statutes.

Indeed it may be suggested that the California Vehicle Code has been designed to so control the driver and vehicles using California highways so as to avoid accidents, and that the inference is compelling that in the majority of cases where an accident has occurred that it has been caused by a violation of one or more of the sections of the California Vehicle Code.

Under the facts of the case at bar, California Vehicle Code Section 20002(a) operates in an area permeated with criminal statutes and the section is "directed at a highly selective group inherently suspect of criminal activities."

C. Assuming, Solely for the Purposes of this Argument, that Section 20002(a) is Directed at the "Public at Large" and Compels Answers to Questions "Neutral on their Face", Section 20002(a) has Violated Byers' Fifth Amendment Privilege under the Facts of this Case.

Even if this Court can validly find that California Vehicle Code Section 20002(a), contrary to the California Supreme Court's holding below, is directed at the "public at large" and compels answers to questions "neutral on their face", Byers has been compelled to give incriminating evidence from his own mouth thus violating his Fifth Amendment privilege against self-incrimination.

It must be again noted that the California Superior Court, during the course of the prohibition proceedings found that the alleged violation of Vehicle Code Section 21750 (failure of Byers as a driver of a vehicle to pass safely to the left) caused the accident which triggered the application of section 20002(a) (A. 49). Thus criminal conduct on the part of Byers *caused* section 20002(a) to be applicable to him. We have already seen that in order to successfully prosecute Byers under the provision of section 21750, the State of California would have to prove that Byers was driving the vehicle when it failed to pass safely to the left. Since section 20002(a) would have required Byers to stop at the scene and give the name and address of the driver of the vehicle (*one of the very facts that the prosecution must prove to convict Byers*), section 20002(a), under these facts, required Byers to incriminate himself. The hazard of self-incrimination was real and substantial, and not a mere trifling or imaginary hazard. For, as the California Supreme Court said below,

> "In the present case, the Superior Court correctly concluded that at the time of the accident, Byers had reasonable ground to apprehend that if he stopped to identify himself as required by section 20002 of the Vehicle Code he would confront a substantial hazard of self-incrimination. The court had

> before it the fact that Byers was charged with violating section 21750 of the Vehicle Code and the stipulation that the accident giving rise to the obligation under section 20002 resulted from the alleged violation of section 21750." (A. 79)

In addition, the real and substantial nature of the hazard of self-incrimination facing Byers at the time of the accident giving rise to the obligation under section 20002 is demonstrated by the fact that the accident occurred on August 20, 1966 (A. 7, 12, 26) and that the criminal complaint charging Byers with the violation of section 21750 and 20002(a) arising out of the accident in question was filed two days later on August 22, 1966 (A. 7, 12, 26). It is difficult to imagine a case where the hazard of self-incrimination was more substantial and real than when it takes only two days from the criminal act to the commencement of the prosecution.

IV. THE HOLDING OF THE CALIFORNIA SUPREME COURT THAT SECTION 20002(a) VIOLATES THE FIFTH AMENDMENT PRIVILEGE IS ENTIRELY CONSISTENT WITH THIS COURT'S HOLDING IN UNITED STATES v. SULLIVAN.

A. Unlike United States v. Sullivan, 274 U.S. 259 (1927), Every Portion of Section 20002(a) Had the Direct and Unmistakable Consequence of Incriminating Respondent Byers.

It has been noted previously that the California Supreme Court has held that the only purpose of California Vehicle Code section 20002 is to protect property owners from financial loss by requiring drivers involved in accidents resulting in property damage to disclose the name and address of the driver of the offending vehicle (A. 68). *Accord: People v. Stansberry*, 242 Cal. App. 2d 199, 203, 51 Cal. Rptr. 403 (1966); *Miglierini v. Havemann*, 240 Cal. App. 2d 570, 573, 49 Cal. Rptr. 795 (1966).

Consistent with this purpose, section 20002 requires the driver of the offending vehicle to give the name and address of the driver at the scene of the accident.[10]

In order to give the information at the scene, the offending driver must stop at the scene, but the only purpose of requiring the driver to stop is to give the compelled information at the scene. We have already seen that the effect of section 20002(a) was to compel Respondent Byers to give the driver's name and address which in turn compelled Byers to incriminate himself under the charge that he violated section 21750 of the California Vehicle Code which violation caused the collision which produced the property damage that involved the provision of section 20002(a).

Since section 20002(a) has a single purpose and a single requirement (to compel the driver of a vehicle to give the name and address of the driver to the owner or person in charge of the damaged property at the scene, for the purposes of protecting the owner against financial loss incurred as a result of the damage) ". . . [u]nlike the income tax return in question in *United States v. Sullivan*, 274 U.S. 259 (1927), every portion of . . ." section 20002(a) ". . . had the direct and unmistakable consequence of incriminating . . ." Respondent Byers. *Marchetti v. United States, supra*, 390 U.S. 39, 48-49 (1968).

The case at bar is completely distinguishable from *Sullivan* in that "every portion" (*albeit*, section 20002(a) has essentially only *one* "portion") of section 20002 is self-incriminating whereas most, if not all, of the Federal Income Tax law is not self-incriminating. In this regard section 20002 is like the federal wagering tax act involved in *Marchetti* and *Grosso*, and is unlike the federal income tax provisions upheld in *Sullivan*.

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[10]A more detailed statement is required if the driver does not locate and notify the owner or person in charge of the damaged property. § 20002(a)(2).

B. The Case at Bar Is Entirely Consistent with United States v. Sullivan, 274 U.S. 259 (1927).

Not only is the case at bar distinguishable from *Sullivan*, but it is also consistent with the suggestion made by this Court in *Sullivan* that if the Federal income tax return required self-incrimination, that the privilege could be claimed in the return to the specific self-incriminating disclosure required by the return. *United States v. Sullivan, supra,* 274 U.S. 259, 263 (1927). Since not every portion of the federal income tax return compelled self-incrimination, Sullivan was not privileged to fail to make a return. *United States v. Sullivan, supra* at 263-264. Whereas, Marchetti was privileged to fail to pay the occupational tax and to fail to register under the federal wagering tax act because ". . . [e]very element of these requirements would have served to incriminate petitioner; to have required him to present his claim to Treasury officers would have obliged him to 'prove guilt to avoid admitting it.'" *Marchetti v. United States, supra,* 390 U.S. 39, 50 (1968).

In this respect, *Sullivan, Marchetti,* and the case at bar are consistent with each other. Since section 20002(a) only requires the driver to give the name and address of the driver at the scene and since under the facts of this case that compelled information was self-incriminating, Respondent Byers was privileged from making the disclosure, under the assumption of absence of use restrictions.

Since the only purpose of the statute was to compel the forbidden disclosure, and since the Fifth Amendment privilege against self-incrimination constitutes a complete defense to the disclosure, the Fifth Amendment privilege would be a complete defense to a prosecution under section 20002 under the facts of this case. Just as Marchetti was privileged to fail to register and pay the occupational tax, Byers was privileged not to make the incriminating disclosure at the scene of the accident as required by section 20002 (a). Just as Sullivan would have been privileged to fail to answer specific incriminating questions contained in

the return, so Byers was privileged not to incriminate himself when required to do so. The crucial difference here between *Sullivan* and the case at bar is that not all of the information required from Sullivan was self-incriminating whereas all of the information compelled from Byers was self-incriminating.[11]

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[11] In footnote 8 of the Brief for the Petitioner (p. 23) several cases are cited in further support of the Petitioner's argument. These cases are all distinguishable from the case at bar. *Warszower v. United States*, 312 U.S. 342 (1941) did not involve a Fifth Amendment claim. *United States v. Walden*, 411 F.2d 1109 (4th Cir. 1969, cert. den. 396 U.S. 931 (1969)) did not involve the situation in which all the defendant could do was to incriminate himself. The defendant could have simply not have operated the distillery. In this regard, *Walden* is like *Minor v. United States*, 396 U.S. 87 (1969) rather than the case at bar. *People v. Mendoza*, 251 Cal. App. 2d 835, 60 Cal. Rptr. 5 (1967) is a simple identification case. It should be noted that there was no statute applicable in *Mendoza* that required the owner or possessor of the .25 caliber automatic pistol there in question, which was concealed in the glove compartment of the car, to give to the police or border guards the name and address of the owner or possessor of the concealed weapon. Also, there was no causative link between the ownership or possession of the concealed weapon and the requirement to identify himself. The requirement of identification came as a result of Mendoza's crossing the international border from Mexico into California. It was only during a customs search that the concealed pistol was found by the custom authorities. *United States v. Olson*, 253 Fed. 233 (W. D. Wash. 1917) did not involve self-incrimination by compelled *compliance* with a penal statute. Defendant there did not register for the draft and consequently did not obtain a draft registration certificate. When he was asked to exhibit his registration certificate as apparently required by the statute, he could not comply. This is a completely distinguishable situation from the situation at bar for in the case at bar. Respondent Byers had to chose between self-incrimination or violating section 20002. In *Olson*, the criminal failure to register resulted in his failure to have a registration certificate and is not meaningfully separated from the original offense.

V. THE CASE AT BAR DOES NOT COME WITHIN THE PURVIEW OF THE "REQUIRED RECORDS DOCTRINE" OF SHAPIRO v. UNITED STATES.

The case at bar does not come within the purview of the "required records doctrine" of *Shapiro v. United States,* 335 U.S. 1 (1948). There are three principal requirements of the "required records doctrine": First, the statute must require the citizen to keep and preserve records of the same kind as he has customarily kept; second, there must be a "public aspect" to the records required to be kept, and third, the requirements must be imposed in an essentially non-criminal and regulatory area of inquiry as in *Shapiro* as opposed to being directed to a "selective group inherently suspect of criminal activities." *Marchetti v. United States, supra,* 390 U.S. 39, 57 (1968); *Grosso v. United States, supra,* 390 U.S. 62, 68-69 (1968); *Haynes v. United States, supra,* 390 U.S. 85, 98-99 (1968); *Leary v. United States, supra,* 395 U.S. 6, 13 (1969)

Each of the three principal elements of the doctrine, as it is described in *Shapiro,* is absent from this situation.

First, Respondent Byers was not, by the provisions of California Vehicle Code section 20002, required to keep and preserve records of the same kind as he has customarily kept. Indeed, the required information, the name and address of the driver and owner of the offending vehicle, which was *his* name and address, is totally unrelated to any record keeping system that Byers might have. Section 20002(a), rather than requiring record keeping of any kind, simply required Byers to provide testimony which resulted in self-incrimination. See *Marchetti v. United States, supra,* 390 U.S. 39, 57 (1968); *McKay, Self-Incrimination and The New Privacy,* 1967 *Sup. Ct. Rev.* 193, 221.

Secondly, there is no "public aspect" to the information required to be given under the compulsion of section 20002(a). As seen before, the sole purpose of the information is to protect owners of private property from financial loss as a result of property damage by some unknown per-

son. It is difficult to imagine a case in which a state statute seeks information for a more limited purpose than the protection of the property rights of a single person against infringement by another single citizen. Section 20002 thus has almost purely "private aspects" rather than "public aspects." The fact that the state requires the information by statute does not justify the conclusion that the information has sufficient "public aspects" to come within the "required records doctrine". In *Marchetti*, this Court said:

> "The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress." *Marchetti v. United States*, 390 U.S. 39, 57 (1968).

Last, for the reasons set forth above,[12] section 20002 is, unlike the statute in *Shapiro*, directed at a "selective group inherently suspect of criminal activities" and therefore again distinguishable from *Shapiro*.

Thus, for the same reasons set forth by this Court in *Marchetti*, *Grosso*, *Haynes* and *Leary*, the "required records doctrine" of *Shapiro* is not applicable to the case at bar.

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[12]See p. 31 to 35, *supra*, of this brief for a full discussion.

VI. THE CREATION OF USE RESTRICTIONS STRUCK AN APPROPRIATE BALANCE BETWEEN THE INTERESTS OF THE STATE AND THE INTERESTS OF RESPONDENT BYERS.

A. This Court Has Never Used a Balancing Formula to Determine Whether the Fifth Amendment Has Been Abridged in a Given Case.

In section IV of the Brief for the Petitioner, the assumption is made, solely for the purposes of argument, that the privilege against self-incrimination does apply to the facts of the case at bar, but it is nevertheless argued that the compelling state interest should be weighed in favor of disclosure (p. 24), thus compelling self-incrimination.

No case is cited by the Attorney General of California which indicates that this Court has ever been willing to approach the Fifth Amendment privilege against self-incrimination in this manner. No weighing or balancing test has ever been used in applying the Fifth Amendment by this Court in any case that we could find. Once it is found that the privilege against self-incrimination does apply the prohibition against violation of the privilege by compelling self-incrimination is *absolute.*

The reason why this Court has never approached the Fifth Amendment other than with the concept of absolute prohibition appears to be twofold: First, the language of the Fifth Amendment itself admits of no other plausible and reasonable interpretation;[13] and, second, it is precisely in the area where the state's interest in a full disclosure is the *most* compelling, that the amendment has its most vital meaning. The argument presented by the Attorney General of California would logically result in the ultimate demise of the Fifth Amendment as a meaningful right of all Ameri-

[13] "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." *United States Constitution, Amendment Five.*

cans, for it would only be invoked to prevent disclosure in cases where the state's interest is not "compelling". So construed, we might as well not have a Fifth Amendment. It is not surprising then that the Attorney General of California cites no authority relevant to his argument, for such a dialectic approach has never been used by this Court in determining whether the Fifth Amendment prohibition has been violated, once it is found that the Fifth Amendment is applicable to the disclosure in question.

United States v. O'Brien, 391 U.S. 367 (1968) is not in point. O'Brien was a First Amendment and not a Fifth Amendment case. This distinction is crucial.

> "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." *Barenblatt v. United States*, 360 U.S. 109, 126 (1959).

Thus in applying the First Amendment this Court has used a balancing formula to determine whether the particular official action has abridged free speech and therefore violated the First Amendment (*see, e.g., Schenck v. United States*, 249 U.S. 47, 52 (1919) (concurring opinion of Mr. Justice Holmes); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Dennis v. United States*, 341 U.S. 494 (1951); *Pickering v. Board of Education*, 391 U.S. 563 (1968)). *O'Brien* presents a "typical" example of this Court's application of the balancing formula in First Amendment cases. The balancing formula has no application to cases involving the Fifth Amendment.

B. The State Interest Involved with Section 20002 is the Protection of Property Owners Against Financial Loss and Is Not "Driver Regulation" and "Highway Safety."

It must be constantly borne in mind that the only purpose of section 20002 of the California Vehicle Code is to protect the owners of private property against financial loss. The Attorney General of California recognizes this as the sole purpose of section 20002 but persistently confuses the "compelling" state interest with other interests not protected by section 20002. Section 20002 has nothing to do with the protection of the interests of "drivers and pedestrians alike in an effort to assure highway safety" (Brief for the Petitioner, p. 24) except insofar as it protects them from financial loss because of damage to their property. Thus, the "compelling" state interest involved in section 20002, and here in issue is not "driver regulation" and "highway safety", but the protection of property owners against financial loss.

C. The California Supreme Court Created Use Restrictions in Order to Recognize the State Interest in Protecting Private Property from Financial Loss and Protect Respondent's Fifth Amendment Privilege Against Self-Incrimination.

The California Supreme Court held that section 20002(a), without more, violated Respondent Byers' Fifth Amendment privilege against self-incrimination under the facts of this case (A. 66), but in order to make the information available for the protection of private property, the California Supreme Court judicially created use restrictions (A. 70), saying:

> "Although the privilege against self-incrimination was applicable, the privilege does not furnish a defense to a charge of violation of section 20002 because the purpose of the privilege is satisfied by the rule we adopt today that prosecuting authorities are

precluded from using information divulged in compliance with section 20002 and the fruits of such information in circumstances where the driver would otherwise be constitutionally privileged not to comply." (A. 79)

Having first found that, without more, section 20002(a) abridged Byers' Fifth Amendment privilege against self-incrimination, the California Supreme Court could only hold either that the Fifth Amendment constituted a complete defense or create restrictions on the use of the information sufficient to protect Respondent Byers' privilege against self-incrimination. As a matter of Federal Constitutional law, no other choice was available to the California Supreme Court once the conclusion was reached that section 20002(a) abridged Byers' Fifth Amendment privilege. *See, e.g., Murphy v. Waterfront Commission, supra,* 378 U.S. 52, 79 (1964); *Albertson v. SACB, supra,* 382 U.S. 70, 79-81 (1965); *Marchetti v. United States, supra,* 390 U.S. 39, 60 (1968); *Grosso v. United States, supra,* 390 U.S. 62, 69-70 (1968); *Haynes v. United States, supra,* 390 U.S. 85, 100 (1968); *Leary v. United States, supra,* 395 U.S. 6, 13 (1969); *Gardner v. Broderick,* 392 U.S. 273, 276 (1968).

Once it is found that the Fifth Amendment privilege has been abridged by a statute, the only way in which the information *may* be compelled is by the imposition of restrictions upon the use of the information so received which must afford "'. . . complete protection from all the perils against which the constitutional prohibition was designed to guard . . .'." *Albertson v. SACB, supra,* 382 U.S. 70, 80 (1965). The constitutional inquiry begins with the determination that the statute in question abridges the Fifth Amendment privilege against self-incrimination and ends with an assessment of the use restrictions imposed for the purposes of determining whether they are adequate to afford "complete protection from all the perils against which the constitutional prohibition was designed to guard."

This portion of the argument assumes that it has been correctly determined that section 20002(a) violates Respondent Byers' Fifth Amendment privilege against self-incrimination. (See, Brief of the Petitioner, p. 24). The only remaining constitutional inquiry is whether the use restrictions imposed by the California Supreme Court adequately protect Respondent Byers from self-incrimination. Since the use restrictions imposed by the California Supreme Court preclude prosecuting authorities from using information divulged in compliance with section 20002 together with the "fruits" of such information, we concede that the use restrictions adequately protect Respondent Byers' Fifth Amendment privilege against self-incrimination. The touchstone of validity of use restrictions in the Respondent Byers' Fifth Amendment privilege, and since he concedes it to be adequately protected by the use restrictions judicially created by the California Supreme Court below, this should end the inquiry under the assumptions of this argument.

The Attorney General of California argues that the use restrictions imposed by the California Supreme Court below make the state's ability to enforce its criminal laws difficult, if not impossible (Brief for the Petitioner, p. 25).

The constitutional validity of use restrictions is determined by whether or not they adequately protect Respondent Byers' Fifth Amendment privilege. If use restrictions do not adequately protect the citizen from self-incrimination, then the only choice is to find that the Fifth Amendment constitutes a complete defense to a criminal prosecution under the statute which compels the information. *Albertson v. SACB, supra,* 382 U.S. 70, 79-81 (1965). See also, *Marchetti v. United States, supra,* 390 U.S. 39, 58-60 (1968); *Grosso v. United States, supra,* 390 U.S. 62, 69-70 (1968); *Haynes v. United States, supra,* 390 U.S. 85, 99-100 (1968); *Leary v. United States, supra,* 395 U.S. 6, 13 (1969).

Once it is concluded that a statute violates a citizen's Fifth Amendment privilege, the particular court must find either that the Fifth Amendment constitutes a complete de-

fense to a prosecution under the statute for failure to divulge the required information or create use restrictions adequate to protect the citizen's Fifth Amendment privilege. The only Federal Constitutional aspects of the problem are the initial determination as to whether the statute violates the Fifth Amendment privilege and, whether the use restrictions if any have been created, are adequate to protect the Fifth Amendment privilege.

The decision to impose use restrictions rather than to hold the Fifth Amendment to be a complete defense, once the Court has found that the statute violates the Fifth Amendment privilege, is a matter of *state law* and not federal constitutional law.

The decision as to which of these two constitutionally adequate alternatives would be used in this case was a matter of the law of the State of California and is not reviewable by this Court. The determination of this issue revolves around the intent of the California Legislature in enacting section 20002 (A. 75-76) and assessing the impact of use restrictions in California upon criminal prosecution of drivers involved in accidents resulting in damage to the property of others (A. 75), both of which are issues in which the Supreme Court of California is the final arbiter.

The California Supreme Court held that use restrictions would not unduly hamper criminal prosecutions in California (A. 75) and that the creation of use restrictions comported with the probable legislative intent of the California Legislature (A. 77).

The Brief for the Petitioner, insofar as it argues that the creation of the use restrictions "made the state's ability to enforce its criminal laws difficult, if not impossible" (Brief for the Petitioner, pp. 24-25) presents no constitutional argument to this Court.

Since the decision by the California Supreme Court to impose adequate use restrictions, rather than to recognize the Fifth Amendment as a complete defense, constitutes a

decision concerning state law only and since the Attorney General of California does not argue that the use restrictions imposed do not adequately protect Byers' Fifth Amendment privilege, no Constitutional attack on the use restrictions actually adopted by the California Supreme Court below has been urged.

It is conceivable that a state might propound a Constitutional argument against over-broad use restrictions (assuming first that the statute in question violates the Fifth Amendment privilege and that the state Supreme Court elected to use the restriction on use device). If the use restrictions imposed exceeded what was necessary to adequately protect the Fifth Amendment privileges of the citizen involved they might be subject to attack, but we do not read the Brief for the Petitioner as propounding such an argument. Quite apparently, the use restrictions imposed in this case are not overbroad for they merely precluded ". . . prosecuting authorities . . . from using information divulged in compliance with section 20002 and the fruits of such information in circumstances when the driver would otherwise be constitutionally privileged not to comply." (A. 79)

The suggestion that these use restrictions "immunizes . . . the fact that he has stopped and the fruits of that stopping" (Brief for the Petitioner, p. 25) may be termed "fanciful" for they have no relationship either to the facts or the use restrictions imposed in this case. The use restrictions concern *using* information divulged in compliance with section 20002 and the fruits of such information. The fact that a person has stopped is neither within the purview of the use restriction, nor the Fifth Amendment. See, *Bailey v. Superior* Court, 4 Cal. App. 3d 513, 84 Cal. Rptr. 436, 440-441 (1970).

VII. REGARDLESS OF THE CONCLUSION REACHED BY THIS COURT ON THE CONSTITUTIONAL ISSUES TENDERED, THE UNIQUE DISPOSITION OF THIS CASE BY THE CALIFORNIA SUPREME COURT ON STATE GROUNDS REQUIRES THIS COURT TO AFFIRM THE JUDGMENT BELOW.

The case before the California Supreme Court below was an appeal by the People from a judgment granting Respondent Byers' petition for a writ of prohibition which judgment prohibited the state from prosecuting Byers under California Vehicle Code Section 20002(a) upon the theory that section 20002(a) violated Byers' Fifth Amendment privilege against self-incrimination. (A. 57, 59, 79-80)

The California Supreme Court held (1) that without consideration of the imposition of use restrictions, section 20002(a) did violate Respondent Byers' Fifth Amendment privilege, but (2) since the California Supreme Court, for the first time in the judicial history of California, judicially created use restrictions which adequately protected Respondent Byers' Fifth Amendment privilege, that Respondent Byers was required to comply with the provision of section 20002(a). (A. 79-81)

A Court more taken with classical theory than with the realities of the world would have reversed the judgment, for classical theory would have found that although the use restrictions were judicially created for the first time in this very appeal, the Court merely "discovered" existing law that existed at the time Byers refused to comply with section 20002 and therefore he was incorrect and could have been punished for his failure to comply.

The California Supreme Court, recognizing that ". . . we here announce a doctrine new to this state's jurisprudence . . ." (A. 80) *affirmed* the judgment saying ". . . it would be unfair to hold that although Byers correctly asserted that the Fifth Amendment privilege was applicable to the question of his compliance with the "hit-and-run" statute he should have complied because of use-restrictions which he could only have speculated might exist." (A. 81-82)

If this Court holds that the California Supreme Court is incorrect in its holding that section 20002(a) violates Respondent Byers' Fifth Amendment privilege, *a fortiori* Byers cannot, with "fairness" be punished for having "correctly asserted", according to all of the justices of the state Supreme Court, that the Fifth Amendment privilege was applicable. Since all of the justices of the state's highest court agreed with Byers that the Fifth Amendment privilege was applicable to the question of his compliance with section 20002, at most he is guilty of bad constitutional jurisprudence, but not of crime. Fairness demands no less than affirmance.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the California Supreme Court below should be affirmed.

Dated: Davis, California
August 12, 1970

John W. Poulos
Counsel for Respondent

Appendix

UNITED STATES CONSTITUTION

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA VEHICLE CODE

§ 16000. Report required. The driver of every motor vehicle which is in any manner involved in an accident originating from the operation of a motor vehicle on any street or highway which accident has resulted in damage to the property of any one person in excess of one hundred dollars ($100) or in bodily injury or in the death of any person shall within 15 days after the accident, report the accident on a form approved by the department to the office of the department at Sacramento, subject to the provisions in this article. (Stats.1959, c. 3, p. 1635, § 16000.)

§ 20001. Death or personal injuries. The driver of any vehicle involved in an accident resulting in injury to any person, other than himself, or death of any person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004, and any person failing to stop or to comply with the requirements under such circumstances is guilty of a public offense and upon conviction thereof shall be punished by imprisonment in the state prison for not less than one year nor more than five years or in the county jail for not to exceed one year or by fine of not to exceed five thousand dollars ($5,000) or by both. (Stats.1959, c. 3, p. 1661, § 20001.)

§ 20002. (a) The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either:

(1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, or;

(2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol.

Any person failing to stop or comply with said requirements is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not to exceed six months or by a fine of not to exceed five hundred dollars ($500) or by both. (Stats.1965, ch. 872, § 3)

§ 20003. Duty upon injury or death. The driver of any vehicle involved in an accident resulting in injury to or death of any person shall also give his name, address, the registration number of the vehicle he is driving, the name of the owner, and upon request and if available exhibit his driver's license to the person struck or the driver or occupants of any vehicle collided with or shall give such information and exhibit his license to any traffic or police officer at the scene of the accident and shall render to any person injured in the accident reasonable assistance, including the carrying or the making arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if such carrying is requested by the injured person. (Stats.1959, c. 3, p. 1661, § 20003.)

§ 20004. Duty upon death. In the event of death of any person resulting from an accident, the driver of any vehicle involved after fulfilling the requirements of this division, and if there be no traffic or police officer at the scene of the accident to whom to give the information required by Section 20003, shall, without delay, report the accident to the nearest office of the Department of the California Highway Patrol or office of a duly authorized police authority and submit with the report the information required by Section 20003. (Stats. 1959, c. 3, p. 1661, § 20004.)

§ 20005. Duty upon damage to property. The driver of any vehicle involved in an accident resulting in damage to property shall take reasonable steps to locate and notify the owner or person in charge of the property of the damage, his name and address, and the registration number of the vehicle he is driving, and shall upon request and if available exhibit his driver's license, except that when the driver of any vehicle collides with any vehicle which is unattended the provisions of Section 20007 shall apply. (Stats. 1959, c. 3, p. 1662, § 20005.)

§ 21750. Overtake and Pass to left. The driver of a vehicle overtaking another vehicle proceeding the same direction

shall pass to the left at a safe distance without interfering with the safe operation of the overtaken vehicle, subject to the limitations and exceptions hereinafter stated.

Amended Ch. 577, Stats. 1961. Effective Sept. 15, 1961.

§ 40000. Misdemeanors. It is unlawful and constitutes a misdemeanor for any person to violate, or to fail to comply with, any provision of this code, unless the violation is under the provisions of this code expressly declared to be a felony or a public offense which is punishable either as a felony or misdemeanor. Stats. 1959 ch. 3

The following is a partial list of California Vehicle Code sections dealing with the operation of motor vehicles upon the highways of the State of California, including registration requirements, equipment requirements, and the rules of the road.

4000	13202	21052	21658
4851	13350	21113	21659
5200	13352	21450	21660
5201	13355	21451	21661
5202	14601	21452	21662
5204	16000	21453	21663
10501	16001	21454	21664
10750	16002	21457	21700
10751	16003	21458	21701
10851	16004	21460	21702
10853	16020	21460.5	21703
11511	16022	21461	21704
12500	16080	21462	21705
12511	16100	21650	21706
12515	20001	21651	21707
12516	20002	21652	21708
12517	20003	21653	21709
12519	20004	21654	21710
12950	20006	21655	21711
12952	20008	21656	21712
13201	20009	21657	21750

21751	22355	23343	25250
21752	22356	24001	25251
21753	22358.5	24002	25268
21754	22362	24003	25269
21755	22363	24004	25400
21756	22400	24250	25951
21757	22405	24251	25952
21758	22409	24252	25953
21759	22410	24400	26311
21800	22450	24401	26450
21801	22451	24402	26451
21802	22452	24403	26452
21803	22500	24404	26453
21804	22504	24405	26454
21805	22505	24406	26455
21806	22510	24407	26456
21807	22514	24408	26457
21950	22515	24409	26502
21951	22516	24410	26503
21952	22517	24600	26504
21954	22520	24601	26505
22100	22700	24603	26506
22101	23100	24604	26507
22102	23101	24606	26508
22103	23102	24607	26520
22104	23103	24800	26521
22105	23108	24950	26522
22106	23109	24951	26700
22107	23110	24952	26703
22108	23111	24953	26706
22109	23112	25101	26707
22110	23114	25102	26708
22111	23120	25103	26709
22113	23121	25104	27153
22349	23122	25105	27154
22350	23123	25106	27155
22351	23123.5	25107	27156
22352	23333	25108	27450
22354	23341	25109	27451

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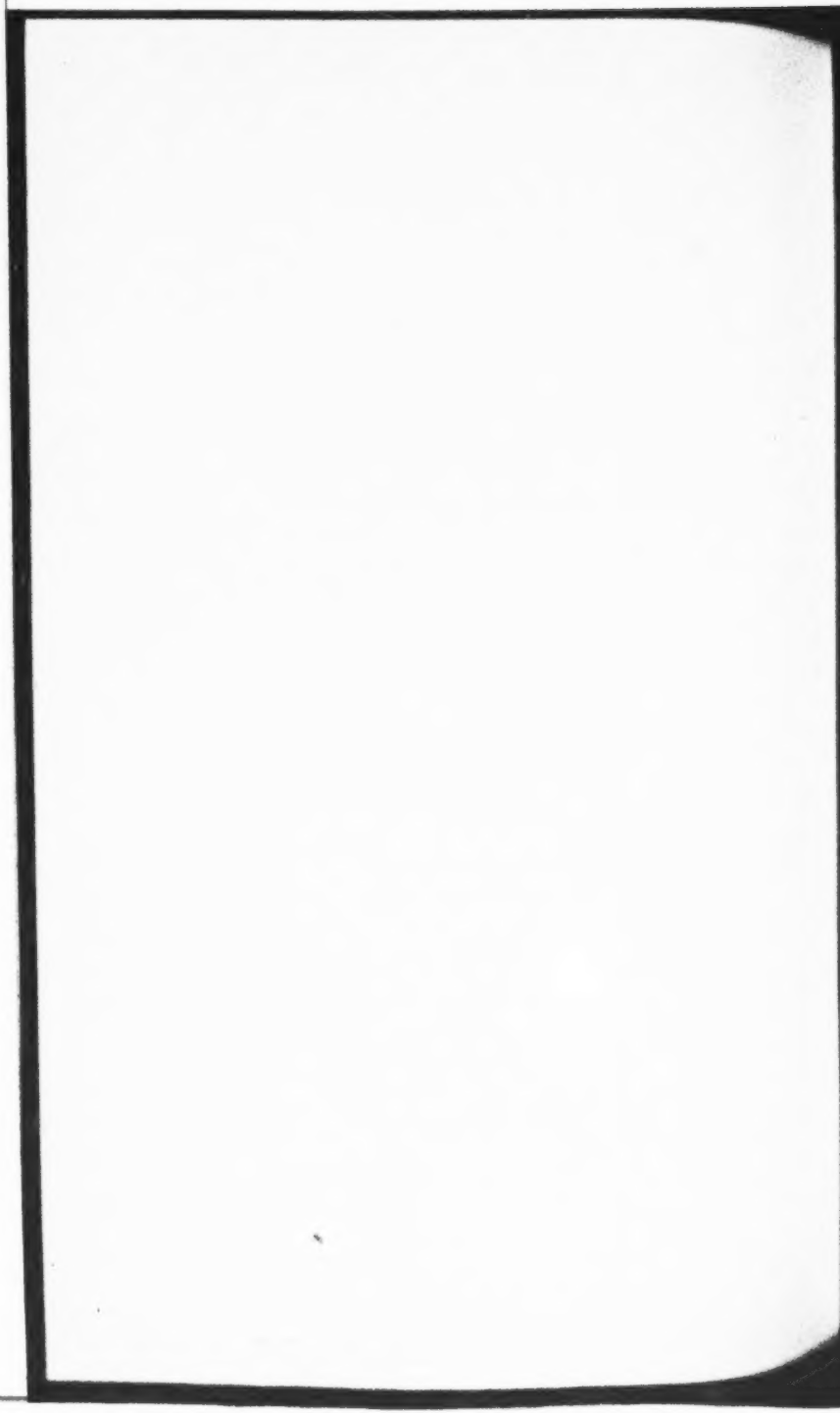

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 75

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

JONATHAN TODD BYERS,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of California

Reply Brief for Petitioner

ARGUMENT

I

THE FAR-REACHING EFFECT OF THE DECISION BELOW CANNOT BE MINIMIZED BY THE BLAND ASSERTION THAT THE ONLY STATUTE DRAWN IN QUESTION IN THIS CASE IS SECTION 20002(a) OF THE CALIFORNIA VEHICLE CODE.

The far-reaching effect of the decision below cannot be minimized by the bland assertion that the only statute drawn in question in this case is section 20002(a) of the California Vehicle Code (Br. 17-19). Nor can the effect be

minimized by the further assertion that the California courts have decided only that the duty imposed upon a driver to stop and disclose his identity falls within the scope of the Fifth Amendment privilege against self-incrimination.

As the respondent has noted (BR 17-19), the decision below has now been extended to other hit-and-run statutes applicable in cases of accident resulting in personal injury. *Bailey v. Superior Court,* 4 Cal.App.3d 513, 84 Cal.Rptr. 436 (1970). Accordingly, the defects and shortcomings of the decision below have now been extended.

As we noted in our opening brief, all jurisdictions and the Uniform Vehicle Code require a driver involved in an accident to stop and disclose his identity. If the decision below is affirmed, it will seriously hamper the goal of preventing accidents and encouraging drivers to be careful. Accordingly, the far-reaching effect of the decision below, in California and elsewhere, cannot be minimized because the only statute drawn in question in this case is section 20002(a) of the California Vehicle Code.

II

COMPLIANCE WITH SECTION 20002(a) DOES NOT VIOLATE THE PRIVILEGE AGAINST SELF-INCRIMINATION.

Although respondent asserts to the contrary, compliance with section 20002(a) does not violate the Fifth Amendment. The requirement imposed upon all drivers involved in an accident to stop and disclose their identity is not testimonial in nature. Similarly, this requirement does not create a substantial hazard of self-incrimination.

The latter conclusion was earlier reached by the Illinois Supreme Court in *People v. Lucus,* 41 Ill.2d 370, 243 N.E.2d 228 (1968). The fact that the defendant was not charged with another crime arising out of the accident played no

part in that decision. Thus, the respondent's attempt to distinguish that decision must fail (Br. 19).

Recent case law in California also demonstrates the erroneous nature of the decision below and the position taken by the respondent here that compliance with section 20002(a) is testimonial in nature and that it creates a substantial hazard of self-incrimination.

In extending the decision below to the personal injury hit-and-run statutes, the California courts have held that the duty imposed upon the driver to stop and disclose his identity falls within the scope of the decision below, but that the additional duty imposed to stop and render assistance is non-testimonial in nature and therefore not privileged.

The respondent does not appear to quarrel with this distinction. Nor does he take issue with our contention that a driver involved in an accident may be required to stop and to leave his fingerprint, or presumably, too, to be photographed or administered a blood test. Indeed, the respondent concedes, as he must, that the state can require any driver involved in an accident to stop, and that this requirement alone does not fall within the scope of the Fifth Amendment (Br. 49).

If, as respondent concedes, the state can validly require a driver to stop, to leave a fingerprint, or to render necessary aid and assistance, it is difficult to see in what way, if any, the mere giving of a name and address is an additional duty which, in some fashion, is privileged. To permit drivers to stop, disclose their identity and leave, would appear to be a far less burdensome means of accomplishing the purposes of section 20002(a) than to require the driver to stop and be photographed or fingerprinted.

Nevertheless, the court below held, and the respondent now urges, that the privilege is applicable because the state might eventually learn the identity of the driver and thereafter attempt to prove that a crime has occurred.[1] Apart from the fact that the decision below fails to discuss how information provided in compliance with section 20002(a) reaches the appropriate prosecuting official (and the respondent speculates only that the police will "inevitably" be called (Br. 24)), the Court below failed to recognize that there are innumerable statutes which require a similar kind of self-identification. Thus, as pointed out earlier in *People v. Diller,* 24 Cal.App. 799, 802, 142 P. 797, 798 (1914):

> "'. . . persons in charge are required to report accidents in mines and factories. Physicians must report deaths and their causes, giving their names and addresses. Druggists must show their prescription lists. Dealers must deliver for inspection foods carried in stock.'" [Quoting from *Ex parte Kneedler,* 243 Mo. 632, 147 S.W. 983 (1912)]

Similarly, all taxpayers must file a truthful tax return, regardless of the source of their income. *United States v. Sullivan,* 274 U.S. 259 (1927). This kind of self-identification which is similar, if not identical, to the requirement that a driver stop and disclose his identity, has never before been considered to be privileged information.

Indeed, if a contrary conclusion were reached, the government's legitimate need for information would be seriously thwarted, and innumerable regulatory programs would be seriously undermined. The "link in the chain" kind of analysis which has been urged by the respondent throughout these proceedings, cannot be literally applied

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1. Respondent's assertion that his "criminal conduct. . . ." "*caused* section 20002(a) to be applicable to him" (Br. 36), is inaccurate. Section 20002(a) is applicable to all drivers who might chance to be involved in an accident, regardless of fault.

in a case of this kind. That test has often been considered in the context of the legislative or judicial setting. In such cases, however, official attention has already been focused on the witness by the very fact that he has been called before the Court or the legislative committee. In a case of this kind, however, where the information required is of a neutral nature and required of all drivers who might chance to be in an accident, the same test cannot be literally applied. On the contrary, the government's need for the information must override any assertion of the privilege.

It is for these reasons that *Shapiro v. United States,* 335 U.S. 1 (1948), embodying the "required records" doctrine is relevant to this case. In the *Shapiro* case the Court sustained a conviction for violation of price regulations based in part upon evidence derived from the defendant's business records.

Although the respondent attempts to demonstrate that the facts of this case cannot be "pigeonholed" into the three premises of that decision, the thrust of the *Shapiro* decision was that a witness can be compelled to produce records of the kind he has customarily kept " 'in order that there may be suitable information of the transactions which are appropriate subjects of governmental regulations and the enforcement of restrictions validly established.' " *Shapiro v. United States, supra* at 33.

We cannot regard as serious the suggestion made by the respondent in his brief that the requirements of section 20002(a) do not constitute a legitimate area of governmental concern because only private property rights may be involved in an accident (Br. 41-42). Nor can we seriously regard his further assertion that driving is in some fashion a private activity, for it surely is not. Indeed, we might add that the right to privacy, which has been characterized

as one of the most basic values underlying the privilege against self-incrimination is a value which surely offers no protection to the respondent in this case.[1]

On the contrary, since a driver's name and address is a totally neutral kind of information which must be disclosed by all drivers who might chance to be in an accident, the rationale underlying *Shapiro v. United States, supra,* is fully applicable here.

Nevertheless, the Court below rejected any analogy to the *Shapiro* case on the basis of an unsubstantiated determination that there is a "substantial shadow of suspicion" cast upon persons involved in accidents (A. 64). The respondent now suggests that this determination is binding (Br. 33-34) and, further, that this holding falls within the *Albertson - Marchetti* line of cases.[2]

However, while this conclusion represents an obvious attempt by the Court below to bring this case within the ambit of the *Albertson - Marchetti* line of cases, the standard adopted by the Court was, in fact, new. The Court below did not characterize drivers involved in accidents as "inherently suspect of criminal activities to the same

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1. McKay, *Self-Incrimination And The New Privacy,* 1967 Sup. Ct.Rev. 193, cited by respondent at pages 29 and 41 of his brief, suggests that of the welter of reasons underlying the privilege, two are paramount. They are: (1) the preservation of official morality; and (2) the right to privacy.

With regard to the first, it is difficult to see in what way, if any, official morality can be undermined by requiring compliance with section 20002(a). If a crime has occurred, the police and the prosecution must still discover and prove it.

Similarly, since driving is so clearly a public activity which can only be carried out on public highways and with regard to the rights and the lives of others, it is difficult to see in what way, if any, a right to privacy can excuse compliance with the state's "hit-and-run" statutes.

2. *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965); *Marchetti v. United States,* 390 U.S. 39 (1968); *Grosso v. United States,* 390 U.S. 62 (1968); *Haynes v. United States,* 390 U.S. 85 (1968); *Leary v. United States,* 395 U.S. 6 (1969).

extent as the groups regulated by the statutes in *Marchetti, Grosso* and *Haynes*" (A. 64). Instead, it stated that "there is in the accident cases, unlike the situation in *Shapiro*, a substantial shadow of suspicion cast upon persons regulated by the statute." This new standard cannot be binding upon this Court, when the issue to be decided is the applicability of the Fifth Amendment to the statute in question.[2]

On the contrary, the decision below represents an unwarranted extension of this Court's opinions. Indeed, one other court has recently agreed with this characterization. Thus, in *People v. Christiansen*, 308 N.Y.S.2d 755, 756 (1970), the Court stated that it considers:

> ". . . the Byers decision an unwarranted extension of the Marchetti rule. The language of the majority opinion in Marchetti does not suggest that it was intended other than to strike down a unique statutory scheme aimed at a limited group of individuals engaged in activities generally illegal in nature."

We urge therefore that the requirement that a driver must stop and disclose his identity does not fall within the scope of the Fifth Amendment privilege against self-incrimination.

III

EVEN IF THE REQUIREMENT IMPOSED BY SECTION 20002(a) DOES FALL WITHIN THE SCOPE OF THE FIFTH AMENDMENT, COMPLIANCE WITH THE STATUTE AND EVIDENTIARY USE OF THE INFORMATION OBTAINED IS REQUIRED IN THE PUBLIC INTEREST.

Assuming arguendo that the requirement imposed upon a driver to stop and disclose his identity does fall within the scope of the Fifth Amendment, compliance with the

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2. Respondent's contention that this Court is bound by the state court's interpretation of section 20002(a) is not well taken for, at least, two reasons. First, a reading of the opinion below demonstrates that the state court believed that its decision was compelled by the decisions of this Court and not by a reading of law peculiar to California. Second, the state court did not base its ruling upon any evidence, but was ruling solely on the constitutionality of the statute itself.

statute and evidentiary use of the information obtained is required because of the compelling and overriding state interest that is presented by this case.

Although the respondent has characterized this argument as one without any kind of case law support, this was the view adopted in a number of earlier cases (see *e.g. People v. Rosenheimer,* 209 N.Y. 115, 102 N.E. 530 (1913), and represents the kind of approach recently accepted by the Court in *People v. Christiansen, supra.*

It is a conclusion which is required in a case of this kind, dealing as it does, with driver safety and highway regulation. If the state cannot effectively enforce its criminal laws, which under the decision below it cannot, then the deterrent effect which the criminal laws have upon the prevention of accidents and a driver's care on the road, is thereby lost. A state must be able to restrict the use of its highways so that only careful and competent people are permitted to use its roads, and to use whatever measures are reasonable and necessary to insure that all drivers comply with the duties and rules imposed. To require all drivers to comply with section 20002(a) and to require that the information so obtained may be used as evidence, is a reasonable and necessary restriction which may be reasonably imposed upon all drivers using the state highways.

Indeed, it may be concluded that all drivers using the state's highways have given an "implied waiver" to this kind of restriction. Whatever validity a theory of "implied waiver" may have in other cases, it may be legitimately concluded here that a waiver has occurred by any person who drives an automobile. As we noted in our opening brief, the duty to stop and disclose his identity is a duty which has been imposed upon all drivers since the early days of the automobile and recognized as such by all drivers. Based as they are upon humanitarian concepts

and a moral content, there is an underlying sense of "fair play" which impels most drivers to stop at the scene of an accident.

Prior to this case the court below had considered this kind of an approach in determining the applicability of the First Amendment to a state regulation prohibiting the political activities of certain public employees. Thus, in *Bagley v. Washington Township Hospital District,* 65 Cal.2d 499, 505, 55 Cal.Rptr. 401, 406, 421 P.2d 409, 414 (1966), the Court had stated that:

> ". . . we cannot accept the apparent suggestion of some few cases that government may never condition the receipt of benefits or privileges upon the non-assertion of constitutional rights. [citations omitted]. The government employee should no more enjoy the right to wrap himself in the flag of constitutional protection against every condition of employment imposed by the government than the government should enjoy an absolute right to strip him of every constitutional protection. Just as we have rejected the fallacious argument that the power of government to impose such conditions knows no limits, so must we acknowledge that government may, when circumstances inexorably so require, impose conditions upon the enjoyment of publicly conferred benefits despite a resulting qualification of constitutional rights.[3]"

"3. [F]ew if any forms of government benefit are so essential or of such a high order that they cannot constitutionally be conditioned in any way. (O'Neil, Unconstitutional Conditions: Welfare Benefits with Strings Attached, supra, 54 Cal.L.Rev. 443,445.)"

Nevertheless, in the present case, the Court rejected the argument that the state could require compliance with section 20002(a) as a reasonable restriction, because it concluded that by means of the "use-restriction" theory of immunity, the "objective underlying section 20002 of the Vehicle Code can be achieved by a means unoffensive to the privilege against self-incrimination (A 68). At the same time the Court concluded that this would 'neither frustrate any apparent significant legislative purpose nor unduly hamper criminal prosecutions of drivers involved in accidents resulting in damage to the property of others.'" (A 75).

However, in arriving at the latter conclusion, the Court failed to consider that, as a practical matter, the theory of use-restriction may effectively bar the state from enforcing its criminal laws. Since compliance with section 20002(a) must be made on the spot, if at all, the opportunity to produce any kind of independent evidence of the driver's identity is more limited than is ordinarily the case. As we pointed out in our opening brief (Br. 25) even if there are 20 witnesses to the accident, is it still possible to say that the state did not learn the driver's identity because he stopped in compliance with section 20002(a)? In view of the practical difficulties imposed by the decision below, it is small wonder that the respondent is now willing to "concede that the use-restrictions adequately protect Respondent Byers' Fifth Amendment privilege against self-incrimination" (Br. 47).[3]

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3. In this connection it is interesting to note that in his petition for hearing filed in the state supreme court, the respondent characterized the use-restriction theory adopted by the court of appeal as providing "a person involved in an automobile accident a practical immunity (which he alone may unilaterally create) from prosecution for any offense arising out of the incident by permitting

A case now pending in the Court of Appeal, Third Appellate District, *Leo Cary Lobato v. Stockton Judicial District, et al.*, 3 Civil 12675, serves to further illustrate our point. The facts of that case as set forth in the briefs of the parties are that the petitioner, an unlicensed driver, hit a parked, unoccupied vehicle in Stockton, California. He remained at the scene of the accident, found the owner of the parked car and identified himself to him.

Some minutes later, police officers arrived at the scene, apparently in response to a call. The petitioner identified himself to the police as the driver of the car which struck the parked car and told them that he had been drinking. The officers noted that petitioner appeared to be unsteady on his feet and smelled of intoxicants. When the officers advised the petitioner of California Vehicle Code section 13353(a)—the "implied consent" statute—[4] the petitioner agreed to undergo a blood test.

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him to comply with the 'hit-and-run' statute, thereby giving information which would furnish a link in the chain of evidence needed to convict him of the offense, and thereby precluding the prosecuting authorities from using any evidence, or its fruits, in the prosecution.

"With such a ruling, neither the public nor the prosecuting authorities can be satisfied."

4. Section 13353(a) provides in pertinent part that:

(a) Any person who drives a motor vehicle upon a highway shall be deemed to have given his consent to a chemical test of his blood, breath or urine for the purpose of determining the alcoholic content of his blood if lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle under the influence of intoxicating liquor. The test shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe such person was driving a motor vehicle upon a highway while under the influence of intoxicating liquor. Such person shall be told that his failure to submit to such a chemical test will result in the suspension of his privilege to operate a motor vehicle for a period of six months. . . .

After a complaint was filed in the Municipal Court charging the petitioner with a violation of Vehicle Code section 23102(a) (misdemeanor drunk driving), petitioner filed a motion to dismiss. He alleged that disclosure of his name and address to the other driver was supplied by him in compliance with Vehicle Code section 20002(a), and that his statement to the police and the results of the blood test were the fruits of his compliance with that statute. Accordingly, he urged that the complaint must be dismissed because there was no competent evidence upon which the criminal charged could validly be based. Although the Municipal Court refused to dismiss the complaint, these same arguments were presented to the Superior Court in a Petition for Writ of Prohibition where they prevailed. This case thus illustrates our concern not only that a disclosure of identity may be barred from use under the decision below, but that evidence ordinarily considered outside the scope of the privilege, such as the results of a blood test, may now be privileged.

Thus, while the respondent urges that this case has nothing to do with highway safety or driver regulation, (Br. 45) we submit that, on the contrary, this case has everything to do with such matters. If, as a practical matter, the state cannot enforce its criminal laws, then the deterrent effect of the criminal laws upon driver care will be lost. Furthermore, since revocation or suspension of a driver's license may be predicated upon conviction, the consequences of the decision below may be even more drastic than we already believe them to be.

It is for these reasons that we respectfully urge that the decision below be reversed. Neither the Fifth Amendment nor the Court's concept of constitutional "fairness" requires that this respondent be excused from compliance with section 20002(a).

CONCLUSION

WHEREFORE, we respectfully submit that the decision below should be reversed.

DATED: December 1, 1970

THOMAS C. LYNCH,
Attorney General of California

ALBERT W. HARRIS, JR.
Assistant Attorney General

LOUISE H. RENNE
Deputy Attorney General

Attorneys for Petitioner

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CALIFORNIA *v.* BYERS

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 75. Argued December 8, 1970—Decided May 17, 1971

Respondent demurred to a count of an indictment charging him with violating Cal. Vehicle Code § 20002 (a)(1) by failing to stop and furnish his name and address after involvement in an automobile accident, resulting in damage to property, on the ground that compliance would have violated his privilege against self-incrimination. His demurrer was sustained by the California Supreme Court, which held that compliance confronted respondent with "substantial hazards of self-incrimination," but upheld the statute by inserting a use restriction on the information disclosed. That court concluded that it would be unfair to punish respondent since he could not reasonably have anticipated the use restriction. *Held:* The judgment is vacated and the case is remanded.

71 Cal. 2d 1039, 458 P. 2d 465, vacated and remanded.

THE CHIEF JUSTICE, joined by MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN, concluded that:

1. Compliance with this essentially regulatory and noncriminal statute, where self-reporting is indispensable to its fulfillment, where the burden is on "the public at large," as distinguished from a "highly selective group inherently suspect of criminal activities," and where the possibility of incrimination is not substantial, does not infringe the privilege against self-incrimination. Pp. 3–7.

2. Even assuming that the statutory requirement of the essentially neutral act of disclosing name and address is incriminating in the traditional sense, it would be an extravagant extension of the privilege to hold that it is testimonial in the Fifth Amendment sense. Just as there is no constitutional right to refuse to file an income tax return, there is no constitutional right to flee the scene of an accident to avoid any possible legal involvement. Pp. 7–10.

MR. JUSTICE HARLAN concluded that the presence, from the individual's point of view, of a "real" and not "imaginary" risk of

Syllabus

self-incrimination is not a sufficient predicate for extension of the privilege against self-incrimination to regulatory schemes of the character involved in this case. Considering the noncriminal governmental purpose of securing the information (to ensure financial responsibility for accidents), the necessity for self-reporting as a means of securing the information, and the limited nature of the required disclosures which leaves the "accusatorial" burden upon the State, the purposes of the Fifth Amendment do not warrant a use restriction as a condition of enforcement of the statute. Pp. 1–25.

BURGER, C. J., announced the Court's judgment and delivered an opinion, in which STEWART, WHITE, and BLACKMUN, JJ., joined. HARLAN, J., filed an opinion concurring in the judgment. BLACK, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[May 17, 1971]

Mr. Chief Justice Burger announced the judgment of the Court and an opinion in which Mr. Justice Stewart, Mr. Justice White, and Mr. Justice Blackmun join.

This case presents the narrow but important question of whether the constitutional privilege against compulsory self-incrimination is infringed by California's so-called "hit and run" statute which requires the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address. Similar "hit and run" or "stop and report" statutes are in effect in all 50 States and the District of Columbia.

On August 22, 1966, respondent Byers was charged in a two-count indictment with two misdemeanor violations of the California Vehicle Code. Count 1 charged that on August 20 Byers passed another vehicle without maintaining the "safe distance" required by § 21750. The second count charged that Byers had been involved in an accident but had failed to stop and identify himself as required by § 20002 (a)(1).

This statute provides: [1]

"The driver of any vehicle involved in an accident resulting in damage to any property including ve-

[1] As an alternative § 20002 (a)(2) requires that the driver shall "[l]eave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the cir-

> hicles shall immediately stop the vehicle at the scene of the accident and shall then and there . . . [l]ocate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved . . . ."

It is stipulated that both charges arose out of the same accident.

Byers demurred to Count 2 on the ground that it violated his privilege against compulsory self-incrimination. His demurrer was ultimately sustained by the California Supreme Court.[2] That court held that the privilege protected a driver who "reasonably believes that compliance with the statute will result in self-incrimination." Here the court found that Byers' apprehensions were reasonable because compliance with § 20002 (a)(1) confronted him with "substantial hazards of self-incrimination." Nevertheless the court upheld the validity of the statute by inserting a judicially-created use restriction on the disclosures which it required. The court concluded, however, that it would be "unfair" to punish Byers for his failure to comply with the statute because he could not reasonably have anticipated the judicial promulgation of the use restriction.[3] We granted certiorari to assess the

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cumstances thereof and shall without unnecessary delay notify the police department. . . ."

The California Supreme Court did not pass upon this part of the statute, and we express no opinion as to its validity. The violation of either part of the statute leaves the driver liable to imprisonment for up to six months or to a fine of up to $500.

The California Vehicle Code also requires drivers involved in accidents resulting in personal injury or death to file accident reports, but there is a statutory use restriction for these compelled disclosures. §§ 20012–20013.

[2] The illegal passing charge contained in Count 1 has never been brought to trial.

[3] Presumably the California holding contemplated that persons who fail to comply with the statute in the future will be subject to prose-

validity of the California Supreme Court's premise that without a use restriction § 20002 (a)(1) would violate the privilege against compulsory self-incrimination. We conclude that there is no conflict between the statute and the privilege.

(1)

Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination are likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours, and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Comparable examples are legion.[4]

In each of these situations there is some possibility of prosecution—often a very real one—for criminal offenses disclosed by or deriving from the information which the law compels a person to supply. Information revealed

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cution and conviction since the use restriction removed the justification for a reasonable apprehension of self-incrimination. Our disposition removes the premise upon which the use restriction rested.

[4] See *Shapiro* v. *United States*, 335 U. S. 1 (1948).

by these reports could well be "a link in a chain" of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here.

United States v. *Sullivan*, 274 U. S. 259 (1927), shows that an application of the privilege to the California statute is not warranted. There a bootlegger was prosecuted for failure to file an income tax return. He claimed that the privilege against compulsory self-incrimination afforded him a complete defense because filing a return, would have tended to incriminate him by revealing the unlawful source of his income. Speaking for the Court, Mr. Justice Holmes rejected this claim on the ground that it amounted to "an extreme if not an extravagant application of the Fifth Amendment." *Id.* at 263–264.[5] Sullivan's tax return, of course, increased his risk of prosecution and conviction for violation of the National Prohibition Act. But the Court had no difficulty in concluding that an extension of the privilege to cover that kind of mandatory report would have been unjustified. In order to invoke the privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with "substantial hazards of self-incrimination."

The components of this requirement were articulated in *Albertson* v. *SACB*, 382 U. S. 70 (1965), and later in

[5] "As the defendant's income was taxed, the statute of course required a return. . . . In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, *but could not on that account refuse to make any return at all.*" 274 U. S. at 263 (emphasis added).

Marchetti v. *United States*, 390 U. S. 39 (1968), *Grosso* v. *United States*, 390 U. S. 62 (1968), and *Haynes* v. *United States*, 390 U. S. 85 (1968). In *Albertson* the Court held that an order requiring registration by individual members of a Communist organization violated the privilege. There *Sullivan* was distinguished:

> "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a *highly selective group inherently suspect of criminal activities.* Petitioners' claims are not asserted in an *essentially noncriminal* and *regulatory area* of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the . . . questions in context might involve the petitioners in the admission of a crucial element of a crime." 382 U. S. at 79 (emphasis added).

Albertson was followed by *Marchetti* and *Grosso* where the Court held that the privilege afforded a complete defense to prosecutions for noncompliance with federal gambling tax and registration requirements. It was also followed in *Haynes* where petitioner had been prosecuted for failure to register a firearm as required by federal statute. In each of these cases the Court found that compliance with the statutory disclosure requirements would confront the petitioner with "substantial hazards of self-incrimination." *E. g., Marchetti* v. *United States*, 390 U. S. at 61.

In all of these cases the disclosures condemned were only those extracted from a "highly selective group inherently suspect of criminal activities" and the privilege was applied only in "an area permeated with criminal statutes"—not in "an essentially noncriminal and regulatory area of inquiry." *E. g., Albertson* v. *SACB*, 382 U. S. at 79; *Marchetti* v. *United States*, 390 U. S. at 47.

Although the California Vehicle Code defines some criminal offenses, the statute is essentially regulatory, not criminal. The California Supreme Court noted that § 20002 (a)(1) was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents. In *Marchetti* the Court rested on the reality that almost everything connected with gambling is illegal under "comprehensive" state and federal statutory schemes. The Court noted that in almost every conceivable situation compliance with the statutory gambling requirements would have been incriminating. Largely because of these pervasive criminal prohibitions, gamblers were considered by the Court to be "a highly selective group inherently suspect of criminal activities."

In contrast, § 20002 (a)(1), like income tax laws, is directed at all persons—here all persons who drive automobiles in California. This group, numbering as it does in the millions, is so large as to render § 20002 (a)(1) a statute "directed at the public at large." *Albertson* v. *SACB*, 382 U. S. at 79, construing *United States* v. *Sullivan*, 274 U. S. 259 (1927). It is difficult to consider this group as either "highly selective" or "inherently suspect of criminal activities." Driving an automobile, unlike gambling, is a lawful activity. Moreover, it is not a criminal offense under California law to be a driver "involved in an accident." An accident may be the fault of others; it may occur without any driver having been at fault. No empirical data is suggested in support of the conclusion that there is a relevant correlation between being a driver and criminal prosecution of drivers. So far as any available information instructs us, most accidents occur without creating criminal liability even if one or both of the drivers are guilty of negligence as a matter of tort law.

The disclosure of inherently illegal activity is inherently risky. Our decisions in *Albertson* and the cases following illustrate that truism. But disclosures with respect to automobile accidents simply do not entail the kind of substantial risk of self-incrimination involved in *Marchetti, Grosso,* and *Haynes.* Furthermore, the statutory purpose is noncriminal and self-reporting is indispensible to its fulfillment.

(2)

Even if we were to view the statutory reporting requirement as incriminating in the traditional sense, in our view it would be the "extravagant" extension of the privilege Justice Holmes warned against to hold that it is testimonial in the Fifth Amendment sense. Compliance with § 20002 (a)(1) requires two things: first, a driver involved in an accident is required to stop at the scene; second, he is required to give his name and address. The act of stopping is no more testimonial—indeed less so in some respects—than requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, to give samples of handwriting, fingerprints or blood. *United States* v. *Wade,* 388 U. S. 218, 221–223 (1967); *Schmerber* v. *California,* 384 U. S. 757, 764 & n. 8 (1966); 8 Wigmore, Evidence § 2265, at 386–400 (McNaughton rev. 1961). Disclosure of name and address is an essentially neutral act. Whatever the collateral consequences of disclosing name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles.

Section 20002 (a)(1) first requires that a driver involved in an accident "shall immediately stop the vehicle at the scene of the accident. . . ." It is of course possible that compliance with this requirement might ultimately lead to prosecution for some contemporaneous criminal

violation of the motor vehicle code if one occurred, or an unrelated offense, always provided such offense could be established by independent evidence. In that sense it might furnish the authorities with what might be called "a link in the chain of evidence needed to prosecute. . . ." *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951). In *Schmerber* v. *California*, *supra*, at 764, the Court held that "the privilege is a bar against compelling 'communications' or 'testimony,' but . . . compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." There the petitioner had been compelled to undergo the forcible withdrawal of blood samples for alcohol content analysis, and the Court sustained this procedure over petitioner's claim that he had been compelled to furnish evidence against himself. See also *Holt* v. *United States*, 218 U. S. 245, 252 (1910) (Holmes, J.) (requiring defendant to model a blouse would be barred only by "an extravagant extension of the Fifth Amendment").

Stopping in compliance with § 20002 (a)(1) therefore does not provide the State with "evidence of a testimonial or communicative nature" within the meaning of the Constitution. It merely provides the State and private parties with the driver's identity for, among other valid state needs, the study of causes of vehicle accidents and related purposes, always subject to the driver's right to assert a Fifth Amendment privilege concerning specific inquiries.

Petitioner argues that since the statutory duty to stop is imposed only on the "driver of any vehicle involved in an accident," a driver's compliance is testimonial because his action gives rise to an inference that he believes that he was the "driver of a vehicle involved in an accident." From this, the petitioner tells us, it can be further inferred that he was indeed the operator of an "accident

involved" vehicle. In *Wade*, however, the Court rejected the notion that such inferences are communicative or testimonial. There the petitioner was placed in a lineup to be viewed by persons who had witnessed a bank robbery. At one point he was compelled to speak the words alleged to have been used by the perpetrator. Despite the inference that the petitioner uttered the words in his normal undisguised voice, the Court held that the utterances were not of a "testimonial" nature in the sense of the Fifth Amendment privilege even though the speaking might well have led to identifying him as the bank robber. *United States* v. *Wade, supra,* at 222–223. Furthermore, the Court noted in *Wade* that no question was presented as to the admissibility in evidence at trial of anything said or done at the lineup. *Id.* at 223. Similarly no such problem is presented here. Of course, a suspect's normal voice characteristics, like his handwriting, blood, fingerprints, or body may prove to be the crucial link in a chain of evidentiary factors resulting in prosecution and conviction. Yet such evidence may be used against a defendant.

After having stopped, a driver involved in an accident is required by § 20002 (a)(1) to notify the driver of the other vehicle of his name and address. A name, linked with a motor vehicle, is no more incriminating than the tax return, linked with the disclosure of income, in *United States* v. *Sullivan, supra.* It identifies but does not by itself implicate anyone in criminal conduct.[6]

Although identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent

[6] We are not called on to decide, but if the dictum of the *Sullivan* opinion were followed, the driver having stopped and identified himself, pursuant to the statute, could decline to make any further statement. *United States* v. *Sullivan, supra,* at 263.

evidence. Here the compelled disclosure of identity could have led to a charge that might not have been made had the driver fled the scene; but this is true only in the same sense that a taxpayer can be charged on the basis of the contents of a tax return or failure to file an income tax form. There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement.

The judgment of the California Supreme Court is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

Vacated and remanded.

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[May 17, 1971]

Mr. Justice Harlan, concurring in the judgment.

For the reasons which follow, I concur in the judgment of the Court.

I

The respondent, Byers, as a driver of a vehicle involved in an accident resulting in property damage, was charged in a two-count complaint with overtaking another vehicle in a manner proscribed by § 21750 of the California Vehicle Code and failing to comply with the requirements of § 20002 (a) of the California Vehicle Code.[1] The parties have stipulated that the accident was caused by petitioner's violation of § 21750 of the California Vehicle Code. App. 36. The California Supreme Court has held that in circumstances where a driver involved in an accident has reason to believe his compliance with § 20002 (a) creates a substantial risk of disclosure of incriminating evidence, the Fifth Amendment requires that the State must either excuse his noncompliance if he properly pleads the privilege against self-incrimination in a subsequent prosecution for failure to comply or forgo the use of any information disclosed by the State's

[1] The text of § 20002 (a) is reproduced in The Chief Justice's opinion, at —, *ante*. Section 21750 of the California Vehicle Code provides:

"The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe opertion of the overtaken vehicle. . . ."

compulsion. Construing the state statute as wholly nonprosecutorial in purpose, the court then held that imposition of a restriction on the use of the information or its fruits in a subsequent criminal prosecution for the conduct causing the accident would be consistent with the state legislative purpose.

I cannot separate the requirement that the individual stop from the requirement that he identify himself for purposes of applying either the "testimonial—non-testimonial" classification of *Schmerber* v. *United States*, 384 U. S. 757 (1966), or the "substantial probability of incrimination" test of *Hoffman* v. *United States*, 341 U. S. 479 (1951). The California Supreme Court treated these requirements, in the primary context in which the statute operates, as compelling identification of oneself as a party involved in the statutorily regulated event. If evidence of that self-identification were admitted at trial, it would certainly be "testimonial." If all that is offered at trial is the identification evidence of third-party witnesses, it still does not follow from *United States* v. *Wade*, 388 U. S. 218 (1967), that because the policies of the Fifth Amendment are not significantly affected by state compulsion to cooperate in the production of real evidence where the State has independently focused investigation on the defendant, these policies are similarly unaffected where the State—in pursuit of "real" evidence—demands of the defendant that he focus the investigation on himself. See generally Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Sup. Ct. Rev. 103, 121–124.

It may be said that requiring the defendant to focus attention on himself as an accident-participant is not equivalent to requiring the defendant to focus attention on himself as a criminal suspect. And that proposition raises the underlying issue which we must resolve in this

case: how do the various verbal formulations for assessing the legal significance of the risk of incrimination, developed by the Court primarily in the context of the criminal process, see *Malloy* v. *Hogan*, 378 U. S. 1, 11–14 (1964); *Hoffman* v. *United States*, 341 U. S. 479 (1951), operate in the context of the state collection of data for purposes essentially unrelated to criminal prosecution?

II

The California Supreme Court in the present case resolved that issue as follows:

> "Decisions of the United States Supreme Court make clear that the privilege against self-incrimination is a personal one, and that whether the government may require a disclosure depends upon the facts of each case. Invocation of the privilege is not limited to situations in which the *purpose* of the inquiry is to get an incriminatory answer. It is the *effect* of the answer that is determinative. 'To sustain [a claim of] privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' " [Citing *Hoffman*, *supra*, and Mansfield, *supra*.] *Byers* v. *Justice Court*, 71 Cal. 2d 1039, 1046 (1969) (emphasis in original).

The California Supreme Court was surely correct in considering that the decisions of this Court have made it clear that invocation of the privilege is not limited to situations where the purpose of the inquiry is to get an incriminating answer. For example, in the context of civil proceedings the privilege is generally available to witnesses as long as a substantial risk of self-incrimination can be made out by the witness. See *McCarthy*

v. *Arndstein*, 266 U. S. 34 (1924); *Murphy* v. *Waterfront Comm.*, 378 U. S. 52, 94 (1964) (WHITE, J., concurring). And, in fairness to the state tribunal whose decision we are reviewing, it must be recognized that a reading of our more recent cases—especially *Marchetti* v. *United States*, 390 U. S. 39 (1968), and *Grosso* v. *United States*, 390 U. S. 62 (1968)—suggests the conclusion that the applicability of the privilege depends exclusively on a determination that, from the individual's point of view, there are "real" and not "imaginary" risks of self-incrimination in yielding to state compulsion. Thus, *Marchetti* and *Grosso* (and the cases they overruled, *United States* v. *Kahriger*, 345 U. S. 22 (1953), and *Lewis* v. *United States*, 348 U. S. 419 (1955)), start from an assumption of a nonprosecutorial governmental purpose in the decision to tax gambling revenue; those cases go on to apply what in another context I have called the "real danger v. imaginary possibility" standard, see *Emspak* v. *United States*, 349 U. S. 190, 209 (1955), to the gambling reporting requirements imposed on the individual in order to determine the constitutionality of those requirements. See *Marchetti* v. *United States*, *supra*, at 48–54; *Grosso* v. *United States*, *supra*, at 66–67. A judicial tribunal whose position with respect to the elaboration of constitutional doctrine is subordinate to that of this Court certainly cannot be faulted for reading these opinions as indicating that the "inherently-suspect-class" factor is relevant only as an indicium of genuine incriminating risk as assessed from the individual's point of view. See also *Haynes* v. *United States*, 390 U. S. 85, 95–98 (1968); *Leary* v. *United States*, 395 U. S. 6, 16–18 (1969); and compare the dissenting opinion of Mr. Justice Frankfurter in the *Kahringer* case, *supra*.

That inference from our past cases was the central premise of the California Supreme Court's opinion. See

Byers v. *Justice Court, supra,* at 1042–1043. Thus, that tribunal is in agreement with the conclusion reached in today's opinion of THE CHIEF JUSTICE that the class of accident participants is not an "inherently suspect class" within the meaning of *Marchetti, Grosso,* and *Haynes.* But the state court went on to conclude that the widespread prevalence of criminal sanctions as a means of regulating driving conduct cast a substantial shadow of suspicion over the class, and that this circumstance plus the driver's awareness that his illegal behavior caused the accident rendered the driver's conclusion that he would incriminate himself by complying with the statute sufficiently plausible to support an assertion of the privilege. *Id.,* at 1045–1046. Starting from the California Supreme Court's premise and looking at our cases defining the test for risks of incrimination, see *Malloy* v. *Hogan,* 378 U. S. 1, 11–14 (1964); *Hoffman* v. *United States,* 341 U. S. 479 (1951); *Rogers* v. *United States,* 340 U. S. 367, 374 (1951); *Brown* v. *Walker,* 161 U. S. 591 (1896), I would have to reach the same conclusion. I am, however, for the reasons stated in the remainder of this opinion, constrained to hold that the presence of a "real" and not "imaginary" risk of self-incrimination is not a sufficient predicate for extending the privilege against self-incrimination to regulatory schemes of the character involved in this case.

III

First, it is instructive to consider the implications of adhering to the premise which the California Supreme Court drew from our prior cases. In *United States* v. *Sullivan,* 274 U. S. 259 (1927), Mr. Justice Holmes stated his view that "[i]t would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in

crime." *Id.*, at 263–264.[2] Yet—at least for an individual whose income is largely or entirely derived from illegal activities—it is, I think, manifestly unsatisfactory to maintain that he should be " 'perfectly clear, from a careful consideration of all the circumstances in the case [that his statement of the amount of his income] *cannot possibly* have [a] tendency' to incriminate." *Hoffman* v. *United States*, 341 U. S. 479, 488–489 (1951). (Emphasis in original.) Certainly that individual would have good reason to suspect that if the State is permitted to introduce his income tax return into evidence, the information contained therein—even if wholly confined to a statement of his gross income—will, when combined with other evidence derived from independent sources, incriminate him. *United States* v. *Burr*, 25 Fed. Cas. 38, 40 (CA Va. 1807). Nor can the "required records" doctrine of *Shapiro* v. *United States*, 335 U. S. 1 (1948), be invoked to avoid that conclusion; for that doctrine, as applied to this situation, would simply mean that the taxing power is of sufficient import to justify compelled self-incrimination.

If Mr. Justice Holmes' assertion that it would be an extreme, if not extravagant, extension of the Fifth Amendment to apply it in such a situation strikes a responsive chord, it is because the primary context from which the privilege emerges is that of the criminal process, both in the investigatory and trial phases. When applied in that context, the sole governmental interest that the privilege defeats is the enforcement of law through criminal sanctions. And, with regard to the witness' privilege, the judge can, for the most part, draw the line between "real" and "imaginary" risks of incrimination in the marginal cases, thereby offsetting the tendency for

[2] He then went on to say that the question need not be reached because there the defendant had declined to make any return at all. *Id.*, at 264.

the privilege to become an absolute right not to disclose any information at all.

But of course governmental interests other than the enforcement of criminal laws are affected by an extension of the privilege to all instances of governmental compulsion to disclose information. In the present case, the interests of the State of California in a system of personal financial responsibility for automobile accidents are implicated. Indeed, in my Brother BRENNAN's view, the price which the State must pay for utilizing compulsory self-reporting to assure personal finnacial responsibility on the highways is to forgo use of the criminal sanction to regulate driving habits in all cases where the individual would be required to comply with § 20002.[3] And I emphasize

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[3] Understandably, MR. JUSTICE BRENNAN recedes from the implications of his position as applied to the facts in the *Sullivan* case. Thus, while conceding that on his premises the privilege would have to apply "if disclosure of the amount of income criminally earned would create a not insubstantial risk of incrimination in any particular case. . . ." he avers that "[s]ince the amount of income earned by an individual engaged in a crime is usually neither relevant to his prosecution for such crimes nor helpful to police authorities in determining that he committed crimes, [Holmes suggestion that the privilege would not apply to report of income earned] would seem . . . logical . . . ." Opinion of MR. JUSTICE BRENNAN, at [8 n. 7].

That, however, will not do. Mr. Justice Holmes' suggestion related to the particular case of a defendant whose income was earned entirely or largely from business in violation of the National Prohibition Act. *Sullivan, supra,* at 262–263. I cannot treat as "imaginary" such a defendant's fear that supplying the Government with a statement of the amount of money derived from his crime will—when combined with other evidence perhaps in the Government's hands—prove helpful in securing his conviction for those crimes. That, of course, is the test MR. JUSTICE BRENNAN must—consistently with his premises—apply. See *United States* v. *Burr,* 25 Fed. Cas. 38, 40 (CA Va. 1807); *Hoffman* v. *United States,* 341 U. S. 479 (1951). And since, on MR. JUSTICE BRENNAN's premises, he must judge the validity of the claim of privilege wholly from the defendant's point of view at

that the logic of the *Hoffman* standard is such that the result cannot be said to turn on an empirical assumption that there is a lower correlation between criminal prosecutions and highway accidents, than between criminal prosecutions and income disclosure. For if the privilege is truly a personal one, and the central standard is the presence of "real" as opposed to "imaginary" risks of self-incrimination, such general empirical differences can only function as evidentiary indicia in assessing the particular individual's claim, in all the circumstances of his particular case, that if he were to comply with the reporting requirement he would run a genuine risk of incrimination. And, if the *Hoffman* standard is to be truly applied—as opposed to indulging in a collection of artificial, if not disingenuous judgments that the risks of incrimination are not there when they really are there—we will have to recognize that in the absence of some sort of immunity grant the individual will be required to decide whether or not to comply without the guidance of a judicial decision as to how the standard applies to his personal situation.

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the time he faces the decision whether or not to yield to governmental compulsion and supply the information, the issue cannot turn on whether or not the record as subsequently developed in a prosecution for income tax evasion shows that the Government actually had additional information on the defendant's criminal activities.

Assuming, then, that Sullivan's claim of privilege would have to be respected if we are to transpose *ipso facto* the Courts' Fifth Amendment jurisprudence to self-reporting requirements of this sort, MR. JUSTICE BRENNAN's position forces the Government to choose between taxing the proceeds of crime and enforcing the criminal sanction relevant to the transaction giving rise to those proceeds.

I note that the question whether the Fifth Amendment requires "transactional" as well as "use" immunity, even in the context of the criminal process, has not been resolved by the Court. See *Piccirillo* v. *New York*, 400 U. S. 548 (1971). See also MR. JUSTICE WHITE's concurring opinion in *Murphy* v. *Waterfront Commission of New York*, 378 U. S. 52, 92 (1964).

That means that the marginal cases should be resolved in the individual's favor. What we are really talking about, then, is either a standard for risks of self-incrimination which protects all personal judgments which are not patently frivolous, or a grant of immunity potentially applicable to all instances of compelled "self-reporting."

Of course the California Supreme Court took the position that the permissible state objective in the reporting requirement and the constitutional values protected by the Fifth Amendment could be accommodated by imposing a restriction on prosecutorial use of the disclosed information and its fruits. See pp. —, *infra*. See generally McKay, Self-Incrimination And the New Privacy, 1967 Sup. Ct. Rev. 193, 229–231; Mansfield, *supra*, at 163–166. But that accommodation leaves the Government's capacity to utilize self-reporting schemes practically impaired by the necessary presumption that evidence used in a prosecution after the individual discloses his relationship to the regulated transaction would not have been available if the individual had not complied with the statute. In the context of "hit-and-run" statutes a use immunity—unless honored in the breach by consistent findings of "no taint"—is likely to render doubtful the State's ability to prosecute in a large class of cases where illegal driving has caused accidents. On the other hand, it would seem unlikely that the state legislature will accept the California Supreme Court's invitation to override the use requirement if the legislative judgment is that the State's ability to use the criminal sanction is too severely handicapped by a use restriction. See p. —, *infra*. For the impact of a practically self-executing claim of privilege on the noncriminal objectives of the reporting requirement would be even more severe. Even under a use restriction, then, the choice open to the State is to forgo prosecution in at least a large number of accident cases involving illegal driving—

the precise situation where criminal sanctions are likely to be most appropriate—or to forgo self-reporting in a large class of accident cases.

MR. JUSTICE BRENNAN argues that to draw this conclusion from the record in this case is to "flout" the conclusion of the California Supreme Court and the California Legislature that imposition of a use restriction as a condition for prosecuting Byers for noncompliance with § 20002 (a) is "not at all inconsistent with the asserted state interests." *Post*, at [13]. Apparently my Brother BRENNAN maintains that imposition of a use restriction in the circumstances of this case will not, in fact, significantly interfere with the State's ability to enforce criminal sanctions relating to driving behavior where that behavior culminates in an accident causing property damage.[4] That, in any event, seems to be the view he attributes to the California Supreme Court and the California Legislature. See opinion of MR. JUSTICE BRENNAN, at [12 n. 10].

But that is certainly not the position the California Supreme Court took, nor the position that court attributed to the state legislature. Thus, having first concluded that the Federal Constitution required recognition of an assertion of the privilege in all situations where the individual confronts "real" and not "imaginary" risks of self-incrimination, the California Supreme Court set about the task of ascertaining the

[4] That is a most difficult position to maintain. By compelling Byers to stop, the State compelled Byers to focus official attention on himself in circumstances which, I agree, involved for Byers a substantial risk of self-incrimination. In this circumstance, the State, if it is to prosecute Byers after the coerced stop, will bear the burden of proving that the State could have selected Byers out from the general citizenry for prosecution even if he had not stopped. With respect to automobile drivers, that would be a heavy burden indeed. I doubt this burden could be met in most cases of this sort consistent with a good-faith judicial application of the rules relating to proof of an independent source of evidence.

legislative preference between legislative goals which, by virtue of the imposition of a federal constitutional requirement, were placed in conflict:

> "Finally, it is instructive, in determining legislative intent, to consider an analogous field of legislation involving a similar conflict between requiring disclosures for noncriminal purposes and the privilege against self-incrimination. In the statutes requiring drivers involved in accidents resulting in personal injury or death to file accident reports, the Legislature has explicitly subordinated the state's prosecutorial interest to the interest in obtaining the disclosure.
>
> "In the present case there is no problem of conflicting state and federal interests; it is the state which both demands disclosure of information in 'hit-and-run' accidents and prosecutes those who commit criminal acts on the highways. Imposing use-restrictions in the present case merely involves this court in making a judgment, based on an assessment of probable legislative intent, that the Legislature would prefer to have the provisions of section 20002 of the Vehicle Code upheld even in cases involving possible criminal misconduct at the cost of some burden on prosecuting authorities in criminal cases arising out of or related to an accident covered by that section rather than avoid that burden at the cost of significantly frustrating the important noncriminal objective of the legislation. Imposition of use-restrictions in the present case will not preclude the Legislature from overriding our decision if it wishes by simply enacting legislation declaring that information derived from disclosures required by section 20002, subdivision (a), *may* be used in criminal prosecutions, in which case the privilege could be claimed in appropriate situations.

"There is another significant distinction between the circumstances in *Marchetti* and the circumstances in the present case. In *Marchetti* the imposition of use-restrictions on information obtained as a result of compliance with the federal wagering tax would have had a much more sweeping effect on state law enforcement than would the imposition of such restrictions here. It appears that most—perhaps almost all—violators of state criminal prohibitions against wagering and related activities are subject to the disclosure requirements of the federal wagering tax. (Marchetti v. United States, *supra*, 390 U. S. 39, 44–46, fns. 5–6.) Thus, the imposition of use-restrictions in order to permit Congress to compel all wagerers to comply with the wagering tax law would have meant that in almost all state prosecutions for wagering or related illegal activities the state would be forced, if the defendant proved compliance with the federal law, to establish that its evidence was untainted. This situation might indeed seriously hamper such state prosecutions. By contrast, far from all criminal violations committed on the highways by drivers of motor vehicles involved property damage. The burden resulting from the imposition of use-restrictions in the latter situation will exist only in those instances where property damage occurs in the course or as a result of a criminal violation committed on the highways by a driver.

"We conclude that criminal prosecutions of drivers involved in accidents will not be unduly hampered by rules that prosecuting authorities may not use information divulged as a result of compliance with section 20002, subdivision (a), of the Vehicle Code or the fruits of such information and that in prosecutions of individuals who have complied with that

section the state must establish that its evidence is not the fruit of such information.

"Since imposition in the present case of use-restrictions as described above will neither frustrate any apparent legislative purpose behind the enactment of section 20002 of the Vehicle Code nor unduly hamper criminal prosecutions of drivers involved in accidents; and since the imposition of such restrictions will not preclude the State Legislature from overriding our decision if it wishes, the reasons impelling the United States Supreme Court to reject the 'attractive and apparently practical' suggestion of imposing restrictions in *Marchetti* v. *United States, supra,* 390 U. S. 39, 58, are absent in the present case, and we must, in order to fulfill our responsibility to protect the privilege against self-incrimination, hold that where compliance with section 20002 of the Vehicle Code would otherwise be excused by an assertion of the privilege, compliance is, as in other cases, mandatory and state prosecuting authorities are precluded from using the information disclosed as a result of compliance or its fruits in connection with any criminal prosecution related to the accident." *Byers* v. *Justice Court, supra,* at 1055–1057 (footnotes omitted).

It is readily apparent from the above passages that the California Supreme Court recognized, as of course it had to, see n. 4 *supra,* that imposition of a use restriction would significantly impair the State's capacity to prosecute drivers whose illegal behavior caused accidents. But that court had decided that the Federal Constitution compelled the State, at the very least, to accept that burden on its prosecutorial efforts in such cases if it wished to pursue its nonprosecutorial goal through compelled self-reporting. Given the availability of the criminal sanction for cases where accidents do not occur the

court concluded that interference with prosecutorial efforts in accident cases was not so important that it rendered the use restriction less palatable to the State than recognition of an outright privilege not to disclose. I fail to see how it "flouts" the State's assessment of its own interests to remove the premise that federal law compels a sacrifice of criminal law enforcement where accidents are involved; I doubt anyone would maintain that criminal law enforcement goals are not significantly served by imposition of criminal sanctions in the very cases where the feared results of dangerous driving have actually materialized. Of course, after the federal law premise has been removed, the State is free to conclude as a matter of state constitutional or legislative policy that continued imposition of use restrictions with respect to this category of cases would still be appropriate in light of the State's own assessment of the relevant regulatory interests at stake and the personal values protected by the privilege against self-incrimination.

IV

Thus the public regulation of driving behavior through a pattern of laws which includes compelled self-reporting to ensure financial responsibility for accidents and criminal sanctions to deter dangerous driving entails genuine risks of self-incrimination from the driver's point of view. The conclusion that the Fifth Amendment extends to this regulatory scheme will impair the capacity of the State to pursue these objectives simultaneously. For compelled self-reporting is a necessary part of an effective scheme of assuring personal financial responsibility for automobile accidents. Undoubtedly, it can be argued that self-reporting is at least as necessary to an effective scheme of criminal law enforcement in this area. The fair response to that latter contention may be that the purpose of the Fifth Amendment is to compel the State

to opt for the less efficient methods of an "accusatorial" system. But see *Schmerber* v. *California*, 384 U. S. 757 (1962). But it would not follow that the constitutional values protected by the "accusatorial" system, see pp. —, *infra*, are of such overriding significance that they compel substantial sacrifices in the efficient pursuit of other governmental objectives in all situations where the pursuit of those objectives requires the disclosure of information which will undoubtedly significantly aid in criminal law enforcement.

For while this Court's Fifth Amendment precedents have instructed that the Fifth Amendment be given a construction "as broad as the mischief against which it seeks to guard," *Miranda* v. *Arizona*, 384 U. S. 436, 459–460 (quoting from *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892)), and while the Court in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), treated the privilege as one of those fundamental rights to be "selectively incorporated" into the Fourteenth Amendment, it is also true that the Court has recognized that the "scope of the privilege [does not coincide] with the complex of values it helps to protect." *Schmerber* v. *California*, 384 U. S. 757, 762 (1966). And see MR. JUSTICE BRENNAN'S concurring opinion in *Marchetti*, *supra*, and *Grosso*, *supra*, 390 U. S., at 72–73. In the *Schmerber* case the Court concluded that the impact of compelled disclosure of "non-testimonial" evidence on the values the privilege is designed to protect was insufficient to warrant a further restriction on the State's enforcement of its criminal laws. And the Court in *Schmerber* explicitly declined reliance on the implication of a "testimonial" limitation to be found in the language of the Fifth Amendment. *Id.*, at 761 n. 6.

The point I draw from the *Schmerber* approach to the privilege is that "[t]he Constitution contains no formulae with which we can calculate the areas within the 'full scope' to which the privilege should extend, and the Court

has therefore been obliged to formulate for itself standards for the application of the privilege. In federal cases stemming from Fifth Amendment claims, the Court has chiefly derived its standards from consideration of two factors: the history and purposes of the privilege, and the character and urgency of the other public intersts involved . . . ." *Spevack* v. *Klein*, 385 U. S. 511, 522–523 (1967). (HARLAN, J., dissenting.)

There are those, I suppose, who would put the "liberal construction" approach of cases like *Miranda*, and *Boyd* v. *United States*, 116 U. S. 616 (1886), side-by-side with the balancing approach of *Schmerber* and perceive nothing more subtle than a set of constructional antinomies to be utilized as convenient bootstraps to one result or another. But I perceive in these cases the essential tension that springs from the uncertain mandate which this provision of the Constitution gives to this Court.

This Court's cases attempting to capture the "purposes" or "policies" of the privilege demonstrate the uncertainty of that mandate. See *Tehan* v. *Shott*, 382 U. S. 406, 413–416 (1966); *Murphy* v. *Waterfront Comm.*, 378 U. S. 52, 55 (1964); *Miranda* v. *Arizona*, 384 U. S. 436, 460; *Boyd* v. *United States*, 116 U. S. 616 (1886). One commentator takes from these cases two basic themes: (1) the privilege is designed to secure among governmental officials the sort of respect for the integrity and worth of the individual citizen thought to flow from the commitment to an "accusatorial" as opposed to an "inquisitorial" criminal process; (2) the privilege is part of the "concern for individual privacy that has always been a fundamental tenet of the American value structure." McKay, Self-Incrimination and the New Privacy, 1967 Sup. Ct. Rev. 193, 210. Certainly, in view of the extension of the privilege to witnesses in civil lawsuits, see *McCarthy* v. *Arndstein*, 266 U. S. 34 (1924)—a context in which, in most instances, informa-

tion is sought by a private party wholly for purposes of resolving a private dispute—it is unlikely that the rationale of the privilege can be limited to preservation of official respect for the individual's integrity. Though the "privacy" rubric is not without its difficulties in the Fifth Amendment area,[8] it does, I think, capture an important element of the concerns of the privilege, which accounts in part for our willingness to accept its reach beyond the context of the criminal investigation or trial. The premise of the criminal sanction—and the disgrace that goes with it—is that it is more feared than the mere censure of our fellow members of society; although communal living requires us to be willing to disclose much to the government and our fellow citizens about our private affairs—and although the fear of eventually having to disclose operates as an inhibiting factor on our personal lives—it still makes sense to think of the Fifth Amendment as intended at least in part to relieve us of the very particular fear arising from the imposition of criminal sanctions.

These values are implicated by governmental compulsion to disclose information about driving behavior as part of a regulatory scheme including criminal sanctions. The privacy interest is directly implicated, while the interest in preserving a commitment to the "accusatorial" system is implicated in the more attenuated sense that an officialdom which has available to it the benefits of a self-reporting scheme may be encouraged to rely upon that scheme for all governmental purposes. But, as I have argued, it is also true that, unlike the ordinary civil lawsuit context, special governmental interests in addition to the deterrence of antisocial behavior by use of criminal sanctions are affected by extension of the privilege to this

[8] See Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cinn. L. Rev. 671, 687–690 (1968).

regulatory context.[6] If the privilege is extended to the circumstances of this case, it must, I think, be potentially available in every instance where the government relies on self-reporting. And the considerable risks to efficient government of a self-executing claim of privilege will require acceptance of, at the very least, a use restriction of unspecified dimensions. Technological progress creates an ever-expanding need for governmental information about individuals. If the individual's ability in any particular case to perceive a genuine risk of self-incrimination is to be a sufficient condition for imposition of use restrictions on the government in all self-reporting contexts, then the privilege threatens the capacity of the government to respond to societal needs with a realistic mixture of criminal sanctions and other regulatory de-

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[6] MR. JUSTICE BRENNAN maintains that the state governmental interest in ensuring personal financial responsibility for automobile accidents is indistinguishable from the ordinary civil lawsuit context. See *post*, at [13]–[14]. That assertion truly does flout the State's assessment of its own interests; § 20002 (a) is only a part of a comprehensive self-reporting scheme for all classes of automobile accidents causing harm to others. See generally California Vehicle Code §§ 20001–20012. The California Supreme Court informs us that this legislative scheme is related in coverage and intent to the state financial responsibility law. (Veh. Code, §§ 16000–16553); see *Byers* v. *Justice Court*, *supra*, at 1054–1055. The premise of that Court's decision to substitute the concededly less complete protection of a use restriction for the outright privilege not to disclose—presumably available in the ordinary civil lawsuit context—can only be that the State's interest in securing personal financial responsibility for automobile accidents is sufficiently distinguishable from the general governmental interest implicated in the maintenance of orderly dispute settlement mechanisms to justify the State's reliance on compelled self-selection as a party involved in events causing harm to others. In view of the presence of similar statutes in every State of the Union and the District of Columbia, I do not understand MR. JUSTICE BRENNAN'S assertion that this premise is "artificial" if not "disingenuous." *Post*, at [14].

vices.[7] To the extent that our *Marchetti-Grosso* line of cases appears to suggest that the presence of perceivable risks of incrimination in and of itself justifies imposition of a use restriction on the information gained by the Government through compelled self-reporting, I think that line of cases should be explicitly limited by this Court.

V

I would not, however, overrule that line of cases. In each of those cases,[8] the Government, relying on its taxing power, undertook to require the individual to focus attention directly on behavior which was immediately recognizable as criminal in virtually every State in the Union. Since compelled self-reporting is certainly essential to the taxing power, those cases must be taken to stand at least for the proposition that the Fifth Amendment requires some restriction on the efficiency with which government may seek to maximize both noncriminal objectives through self-reporting schemes and enforcement of criminal sanctions. If the technique of

[7] My Brother BRENNAN's primary response to my view that significant interference with state regulatory goals unrelated to the deterrence of antisocial behavior through criminal sanctions may mean that there is no Fifth Amendment privilege even though from the individual's point of view there are "real" and not "imaginary" risks of self-incrimination is a citation to Mr. Justice Brandeis' distinguished dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438, 472–477 (1928). Brandeis' views were expressed in the context of a case where no such governmental interest could be said to be implicated; to sever those views from their context and transpose them *ipso facto* to the problem at hand is to slide softly into that "lake of generalities" from which confusion is sure to flow. Cf. opinion of MR. JUSTICE BRENNAN, at 6.

[8] *Marchetti* v. *United States*, 390 U. S. 39 (1968); *Grosso* v. *United States*, 390 U. S. 62 (1968); *Haynes* v. *United States*, 390 U. S. 85 (1968); *Leary* v. *United States*, 395 U. S. 6 (1969).

self-reporting as a means of achieving regulatory goals unrelated to deterrence of antisocial behavior through criminal sanctions is carried to an extreme, the "accusatorial" system which the Fifth Amendment is supposed to secure can be reduced to mere ritual. And the risk that such a situation will materialize is not merely a function of the willingness of an ill-disposed officialdom to exploit the protective screen of "ostensible legislative purpose" to bypass the procedural limitations on governmental collection of information in the criminal process. The sweep of modern governmental regulation—and the dynamic growth of techniques for gathering and using information culled from individuals by force of criminal sanctions—could of course be thought to present a significant threat to the values considered to underpin the Fifth Amendment, quite apart from any supposed illegitimate motives that might not be cognizable under ordinary canons of judicial review. As uncertain as the constitutional mandate derived from this portion of the Bill of Rights may be, it is the task of this Court continually to seek that line of accommodation which will render this provision relevant to contemporary conditions.

In other words, we must deal in degrees in this troublesome area. The question whether some sort of immunity is required as a condition of compelled self-reporting inescapably requires an evaluation of the assertedly noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures required. See generally, Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966, Sup. Ct. Rev. 103, 128–160.

The statutory schemes involved in *Marchetti* and related cases, see n. 8, *supra*, focused almost exclusively on conduct which was criminal. As the opinion of THE

CHIEF JUSTICE points out, the gambling activities involved in *Marchetti* and *Grosso* which gave rise to the obligation to report under that statutory scheme were illegal under federal law and the laws of almost every State in the Union. *Marchetti, supra,* at 44–46. Indeed, MR. JUSTICE BRENNAN's concurring opinion in *Marchetti* and *Grosso, supra,* at 74–75, concisely sets forth the precise degree of focus on criminal behavior as the predicate for state compulsion to report information:

> "The Court's opinions fully establish the statutory system's impermissible invasions of the privilege. Indeed, 26 U. S. C. § 4401 should create substantial suspicion on privilege grounds simply because it is an excise tax upon persons 'engaged in the business of accepting wagers' or who conduct 'any wagering pool or lottery.' The persons affected by this language are a relatively small group, many of whom are engaged in activities made unlawful by state and federal statutes. But § 4401 is actually even more directly confined to that group. Section 4402 (1) exempts from the tax wagers placed with a parimutual wagering enterprise 'licensed under state law,' and § 4421 defines 'wager' to exclude most forms of unorganized gambling such as dice and poker, and defines 'lottery' to exclude commonly played games such as bingo and drawings conducted by certain tax-exempt organizations. The effect of these exceptions is to limit the wagering excise tax under § 4401 almost exclusively to illegal, organized gambling.
>
> "Moreover, the code contemplates extensive recordkeeping reporting by persons obliged to pay the tax. But these are records and reports which would incriminate overwhelmingly. Section 6011 (a) requires any person liable to pay a tax to file a return in accordance with the forms and regulations pro-

> mulgated by the Secretary or his delegate. The regulations promulgating record-keeping requirements and the requirement that taxpayers make a monthly return on Form 730 . . . were therefore formulated pursuant to specific congressional authority. That the return is intended to be a part of the wagering tax obligation is clear from the face of the return itself. . . ."

Although compelled self-reporting is certainly essential to the taxing power, the decision to collect taxes through a special regulatory scheme which conditions the obligation to report on intent to commit a crime or the actual commission of a crime represents a determination to pursue noncriminal governmental purposes to the entire exclusion of the values protected by the Fifth Amendment. Cf. *Grosso, supra,* at 76 (1968) (BRENNAN, J., concurring). In a very real sense, compliance with the statutory requirements involved in *Marchetti* and *Grosso,* followed by use of the information in a prosecution, reduced the "accusatorial system" to the role of a merely ritualistic confirmation of the "conviction" secured through the exercise of the taxing power. Those statutory schemes are hardly distinguishable from a governmental scheme requiring robbers to register as such for purposes of paying an occupational tax and a tax on the proceeds of their crimes. Cf. my Brother BRENNAN's opinion in the instant case, at 10.

In contrast, the "hit-and-run" statute in the present case predicates the duty to report on the occurrence of an event which cannot, without simply distorting the normal connotations of language, be characterized as "inherently suspect"; *i. e.,* involvement in an automobile accident with property damage. And, having initially specified the regulated event—*i. e.,* an automobile accident involving property damage—in the broadest terms possible consistent with the regulatory scheme's concededly non-

criminal purpose, the State has confined the portion of the scheme now before us, see n. 1 of THE CHIEF JUSTICE'S opinion, to the minimal level of disclosure of information consistent with the use of compelled self-reporting in the regulation of driving behavior. Since the State could—in the context of a regulatory scheme including an otherwise broad definition of the regulated event—achieve the same degree of focus on criminal conduct through detailed reporting requirements as was achieved in *Marchetti* and *Grosso* through the definition of the event triggering the reporting duties of the gambling tax scheme, the Court must take cognizance of the level of detail required in the reporting program as well as the circumstance giving rise to the duty to report; otherwise, the State, possessed of as it is of increasingly sophisticated techniques of information-gathering and storage, will, in the zealous pursuit of its noncriminal regulatory goals, reduce the "accusatorial system" which the Fifth Amendment is intended to secure to a hollow ritual.

California's decision to compel Byers to stop after his accident and identify himself will not relieve the State of the duty to determine, entirely by virtue of its own investigation after the coerced stop, whether or not any aspect of Byer's behavior was criminal. Nor will it relieve the State of the duty to determine whether the accident which Byers was forced to admit involvement in was proximately related to the aspect of his driving behavior thought to be criminal.[9] In short, Byers having

[9] It bears repeating that Byers was charged with passing another vehicle at an unsafe distance, see n. 1, *supra;* he was not charged with being involved in an automobile accident causing property damage. Although the California Supreme Court did not deal with § 21750 of the Vehicle Code, we may assume that the fact of the accident becomes relevant to the illegal passing charge only if the allegedly unsafe aspects of Byers' passing was the proximate cause of the resulting accident. Of course, the parties in the instant litigation stipulated to that effect. See App., at 36. That stipula-

once focused attention on himself as an accident-participant, the State must still bear the burden of making the main evidentiary case against Byers as a violator of § 21750 of the California Vehicle Code.[19] To characterize this burden as a merely ritualistic confirmation of the "conviction" secured through compliance with the reporting requirement in issue would be a gross distortion of reality; on the other hand, that characterization of the evidentiary burden remaining on the state and federal governments after compliance with the regulatory scheme involved in *Marchetti* and *Grosso* seems proper.

VI

Considering the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures involved, I cannot say that the purposes of the Fifth Amendment warrant imposition of a use restriction as a condition on the enforcement of this statute. To hold otherwise would, it seems to me, embark us on uncharted and treacherous seas. There will

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tion certainly supports the conclusion that Byers faced a "real" and not "imaginary" risk of self-incrimination at the time he had to make his decision to whether or not to stop. But on my analysis the presence of such risks is not a sufficient predicate for the assertion of the privilege in this regulatory context; we must also consider the impact on the "accusatorial system" of permitting the State to utilise the fruits of the coerced stop in a subsequent prosecution. For that purpose, the *post hoc* stipulation of the parties as to the legal cause of the accident in a subsequent prosecution for failing to stop is irrelevant.

[19] I do not minimise the aid given the State of California by virtue of the requirement to stop and identify oneself. But this minimal requirement is essential to the State's nonprosecutorial goal, and, the stop having been once coerced, virtually all information secured after the stop is likely to be tainted for purposes of exclusion under the Fifth Amendment in any subsequent prosecution. See n. 4, *supra*.

undoubtedly be other statutory schemes utilizing compelled self-reporting and implicating both permissible state objectives and the values of the Fifth Amendment which will render this determination more difficult to make. A determination of the status of those regulatory schemes must, of course, await a proper case.

On the premises set forth in this opinion, I concur in the judgment of the Court.[11]

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[11] My Brother BRENNAN, relying on *Raley* v. *Ohio*, 360 U. S. 423 (1959), apparently takes the position that because I do agree that *Marchetti* and *Grosso* could fairly be read to support respondent Byers' refusal to comply with § 20002 (a) on Fifth Amendment grounds, I am constrained to hold that, as a matter of federal due process, Byers cannot be prosecuted by the State. On the premises set forth in my opinion, Byers' position is analytically indistinguishable from any individual whose claim of constitutional privilege with respect to primary behavior is defeated by a holding of this Court limiting a prior constitutional precedent. See *post*, at [14]. *Raley*, of course, recognized such a due process right in a factual setting involving a great deal more than retroactive application of a judicial ruling limiting prior constitutional precedent.

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[May 17, 1971]

Mr. Justice Black, with whom Mr. Justice Douglas and Mr. Justice Brennan join, dissenting.

Since the days of Chief Justice John Marshall this Court has been steadfastly committed to the principle that the Fifth Amendment's prohibition against compulsory self-incrimination forbids the Federal Government to compel a person to supply information which can be used as a "link in a chain of testimony" needed to prosecute him for a crime. *United States* v. *Burr*, 25 Fed. Cas. 38, 40 (CA Va. 1807). It is now established that the Fourteenth Amendment makes that provision of the Fifth Amendment applicable to the States. *Malloy* v. *Hogan*, 378 U. S. 1 (1964). The plurality opinion, if agreed to by a majority of the Court, would practically wipe out the Fifth Amendment's protection against compelled self-incrimination. This protective constitutional safeguard against arbitrary government was first most clearly declared by Chief Justice Marshall in the trial of Aaron Burr in 1807. *United States* v. *Burr, supra.* In erasing this principle from the Constitution the plurality opinion retreats from a cherished guarantee of liberty fashioned by James Madison and the other founders of what they gladly proclaimed to be our free government. One need only read with care the past cases cited in today's opinions to understand the shrinking process to which the Court today subjects a vital safeguard of our Bill of Rights.

The plurality opinion labors unsuccessfully to distinguish this case from our previous holdings enforcing the Fifth Amendment guarantee against compelled self-incrimination. See, *e. g.*, *Albertson* v. *SACB*, 382 U. S. 70 (1965); *Grosso* v. *United States*, 390 U. S. 62 (1968); *Marchetti* v. *United States*, 390 U. S. 39 (1968); *Leary* v. *United States*, 395 U. S. 6 (1969); *Haynes* v. *United States*, 390 U. S. 85 (1968). The plurality opinion appears to suggest that those previous cases are not controlling because respondent Byers would not have subjected himself to a "substantial risk of self-incrimination" by stopping after the accident and providing his name and address as required by California law. See California Vehicle Code § 20002 (a)(1). This suggestion can hardly be taken seriously. A California driver involved in an accident causing property damage is in fact very likely to have violated one of the hundreds of state criminal statutes regulating automobiles which comprise most of two volumes of the California Code.[1] More important, the particular facts of this case demonstrate that Byers would have subjected himself to a "substantial risk of self-incrimination" had he given his name and address at the scene of the accident. He has now been charged not only with failing to give his name but also with passing without maintaining a safe distance as prohibited by California Vehicle Code § 21750. It is stipulated that the allegedly improper passing caused the accident from which Byers left without stating his name and address. In a prosecution under § 21750, the State will be required to prove that Byers was the driver who passed without maintaining a safe distance. Thus if Byers had stopped and provided his name and address as the driver involved in the accident, the State could have used that information to

[1] See California Vehicle Code §§ 1–42273 (1960).

establish an essential element of the crime under § 21750. It seems absolutely fanciful to suggest that he would not have faced a "substantial risk of self-incrimination" by complying with the disclosure statute.

The plurality opinion also seeks to distinguish this case from our previous decisions on the ground that § 20002 (a)(1) requires disclosure in an area not "permeated with criminal statutes" and because it is not aimed at a "highly selective group inherently suspect of criminal activities." *Ante,* at 5–6. Of course these suggestions ignore the fact that *this particular respondent* would have run a serious risk of self-incrimination by complying with the disclosure statute. Furthermore, it is hardly accurate to suggest that the activity of driving an automobile in California is not "an area permeated with criminal statutes." *Ante,* at 5. And it is unhelpful to say the statute is not aimed at an "inherently suspect" group because it applies to "all persons who drive automobiles in California." *Ante,* at 6. The compelled disclosure is required of all persons who drive automobiles in California *who are involved in accidents causing property damage.*[2] If this group is not "suspect" of illegal activities, it is difficult to find such a group.

The plurality opinion purports to rely on *United States* v. *Sullivan,* 274 U. S. 259 (1927), to support its result.

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[2] "The driver of any vehicle *involved in an accident resulting in damage to any property* including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either:

"(1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, or;

"(2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver . . . ." (Emphasis added.) California Vehicle Code § 20002 (a).

But *Sullivan* held only that a taxpayer could not defeat a prosecution for failure to file a tax return on the grounds that his income was illegally obtained. The Court there suggested that the defendant could lawfully have refused to answer particular questions on the return if they tended to incriminate him.[3] Here, unlike *Sullivan*, the only information that the State requires Byers to disclose greatly enhances the probability of conviction for crime. As I have pointed out, if Byers had stopped and identified himself as the driver of the car in the accident, he would have handed the State an admission to use against him at trial on a charge of failing to maintain a safe distance while passing. Thus Byer's failure to stop is analogous to a refusal to answer a particular incriminating question on a tax return, an act protected by the Fifth Amendment under this Court's decision in *Sullivan*. Cf. *Marchetti* v. *United States, supra; Grosso* v. *United States, supra.*

I also find unacceptable the alternative holding that the California statute is valid because the disclosures it requires are not "testimonial" (whatever that term may mean). *Ante,* at 7. Even assuming that the Fifth Amendment prohibits the State only from compelling a man to produce "testimonial" evidence against himself, the California requirement here is still unconstitutional. What evidence can possibly be more "testimonial" than a

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[3] "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld. Most of the items warranted no complaint. It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime." 274 U. S. 259, 263–264.

man's own statement that he is a person who has just been involved in an automobile accident inflicting property damage? Neither *United States* v. *Wade*, 388 U. S. 218 (1967), nor any other case of this Court has ever held that the State may convict a man by compelling him to admit that he is guilty of conduct constituting an element of a crime. Cf. *United States* v. *Burr*, *supra*. Yet the plurality opinion apparently approves precisely that result.

My Brother HARLAN'S opinion makes it clear that today the Court "balances" the importance of a defendant's Fifth Amendement right not to be forced to help convict himself against the government's interest in forcing him to do so. As in previous decisions, this balancing inevitably results in the dilution of constitutional guarantees. See, *e. g.*, *Konigsberg* v. *State Bar*, 366 U. S. 36, 56 (1961) (BLACK, J., dissenting). By my Brother HARLAN'S reasoning it appears that the scope of the Fifth Amendment's protection will now depend on what value a majority of nine Justices chooses to place on this explicit constitutional guarantee as opposed to the government's interest in convicting a man by compelling self-incriminating testimony. In my view, vesting such power in judges to water down constitutional rights does indeed "embark us" on Brother HARLAN'S "uncharted and treacherous seas." *Ante*, at 24.

I can only assume that the unarticulated premise of the decision is that there is so much crime abroad in this country at present that Bill of Rights' safeguards against arbitrary government must not be completely enforced. I can agree that there is too much crime in the land for us to treat criminals with favor. But I can never agree that we should depart in the slightest way from the Bill of Rights' guarantees that give this country its high place among the free nations of the

world. If we affirmed the State Supreme Court, California could still require persons involved in accidents to stop and give their names and addresses. The State would only be denied the power to violate the Fifth Amendment by using the fruits of such compelled testimony against them in criminal proceedings. Instead of criticizing the Supreme Court of California for its rigid protections of individual liberty, I would without more ado affirm its judgment.

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[May 17, 1971]

Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall join, dissenting.

Although I have joined my Brother Black's opinion in this case, the importance of the issues involved and the wide range covered by the two opinions supporting the Court's judgment in this case make further comment desirable. Put briefly, one of the primary flaws of the plurality opinion is that it bears so little relationship to the case before us. Notwithstanding the fact that respondent was charged both with a violation of the California Vehicle Code which resulted in an accident, and with failing to report the accident and its surrounding circumstances as required by the statute under review, the plurality concludes, contrary to all three California courts below, that respondent was faced with no substantial hazard of self-incrimination under California law. My Brother Harlan, by contrast, recognizes the inadequacy of any such conclusion. In his view, our task is to make the Bill of Rights "relevant to contemporary conditions" by simply not applying its provisions when we think the Constitution errs. *Ante*, at [20]. In the context of the present case, this appears to mean that current technological progress enabling the Government more easily to use an individual's compelled statements against him in a criminal prosecution should be matched by frank judicial contraction of the privilege against self-incrimination lest the Government be hindered in using

modern technology further to reduce individual privacy. Needless to say, neither of these approaches is consistent with the Constitution.

I

This case arises from an attempt by the State of California to punish an assertion of the Fifth Amendment's privilege against self-incrimination. Respondent Byers was charged with a statutory duty to report his involvement as a driver in an auto accident involving property damage. This he refused to do, and California seeks to impose criminal punishment for his refusal. Unlike the plurality, I believe that analysis of the question whether California may do so is inevitably tied to the circumstances of this case. I therefore turn to the record.

Respondent was initially charged in Justice Court with two violations of California law. The information alleged, first, that he violated California Vehicle Code § 21750 (Supp. 1971) by improper passing; and second, that he was involved in an accident causing property damage and failed to report his name, address, and the circumstances of the accident to the other driver involved and the California Highway Patrol. Cal. Vehicle Code § 20002 (1960).[1] After a demurrer to the information was rejected, respondent sought a writ of prohibition to restrain prosecution of the second charge of the information.

The California Superior Court dealt with the statutory reporting requirement only as applied to respondent. It found as a fact that the alleged improper passing with which respondent was charged caused the accident that respondent was charged with failing to report. App. 49. The court found it "hard to imagine a more damaging link in the chain in a prosecution under Vehicle Code

[1] In 1967, subsequent to the accident involved in this case, the statute was amended in ways not material here. See Cal. Vehicle Code § 20002 (Supp. 1971).

§ 21750 than that which establishes that the defendant was driving the vehicle involved." App. 42. Since on these facts it was "obvious," App. 44, that respondent faced a substantial hazard of self-incrimination if he reported that he was the driver of one of the automobiles involved in the accident, the Superior Court issued the writ to restrain prosecution for failure to make the report.

The California Court of Appeals also dealt with the statute only as applied to respondent. Like the Superior Court, it found it "difficult to imagine a more damaging link in the chain of prosecution" than the requirement of § 20002 that respondent inform the police that he was the driver of one of the vehicles involved in the accident. As the Court of Appeals put the matter, "To compel [respondent] to comply with [§ 20002] and thus to admit a fact essential to his conviction of a violation of section 21750 is to compel him to give a testimonial declaration that falls directly within the scope of the constitutional privilege." 71 Cal. Rptr. 609, 612 (Ct. App. 1968). It concluded, however, that respondent could be criminally punished for his failure to report *because* the Fifth Amendment prohibited the use of "admissions and statements made in compliance with" § 20002 "in a prosecution for a criminal offense arising out of the same course of conduct." *Ibid.* It reversed the Superior Court's grant of the writ of prohibition.[2]

Finally, the California Supreme Court likewise dealt with the statute in the context of its application to petitioner. It first identified the "crucial inquiry in determining the applicability of the privilege" as

> "whether the *individual* seeking to avoid disclosure faces 'substantial hazards of self-incrimination' because *in his particular case* there is a substantial likelihood that information disclosed by him in compliance with the statute could by itself or in con-

[2] Cf. *Raley* v. *Ohio*, 360 U. S. 423 (1959).

> junction with other evidence be used to secure his conviction of a criminal offense." 71 Cal. 2d 1039, 1043, 458 P. 2d 465, 468 (1969) (emphasis added).

Second, it construed the California statute in question to require a person to whom it applies to report not merely his name and address, but also that he was the driver of an automobile involved in a particular accident. 71 Cal. 2d, at 1045, 458 P. 2d, at 470. It held the privilege against self-incrimination applicable to the "driver of a motor vehicle involved in an accident [who] is confronted with [the] statutory requirement . . . [and who] reasonably believes that compliance with the statute will result in self-incrimination." *Id.*, at 1047, 458 P. 2d, at 471. It agreed with the two courts below that respondent, at the time of the accident, "had reasonable ground to apprehend that if he stopped to identify himself as required . . . he would confront a substantial hazard of self-incrimination." *Id.*, at 1057, 458 P. 2d, at 477. It agreed with the Court of Appeals, however, that the statute could and should be limited by restricting the use of information acquired pursuant to the statutory compulsion in circumstances where the particular individual reporting could demonstrate a substantial risk of self-incrimination.[3] *Id.*, at 1050–1056, 458 P. 2d, at 472–477. Contrary to the Court of Appeals, however, the California Supreme Court felt that it would be unfair to punish respondent when he could have had no knowledge that use restrictions would be applied by the courts. Accordingly, it reversed the Court of Appeals and affirmed the Superior Court. *Id.*, at 1057–1058,

[3] The California court noted that use restrictions were imposed by the California Legislature itself with regard to required accident reports where the accident resulted in personal injury or death, see Cal. Vehicle Code § 20012 (Supp. 1971). 71 Cal. 2d, at 1055, 458 P. 2d, at 476.

458 P. 2d, at 477–478. The two dissenting justices took issue with the majority only over the question whether respondent's punishment would be unfair. *Id.*, at 1059–1060, 458 P. 2d, at 479.

II

The plurality opinion, unfortunately, bears little resemblance either to the facts of the case before us or to the law upon which it relies. Contrary to the plurality opinion, I do not believe that we are called upon to determine the broad and abstract question "whether the constitutional privilege against compulsory self-incrimination is infringed by California's so-called 'hit and run' statute[4] which requires the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address." *Ante*, at [1]. I believe we are called upon to decide the question presented by this case, which is whether California may punish respondent, over his claim of the privilege against self-incrimination, for failing to comply with the statutory requirement that he report his name and address, *and the fact that he was the driver of an automobile involved in this particular accident.* Despite the plurality's assurance that its "judicial scrutiny is . . . a close one," *ante*, at [3], I believe that in the course of explaining its own views regarding "disclosures with respect to automobile accidents" in general, *ante*, at [7], the plurality has lost sight of the record before us. See *ante*, at [3], [5]–[6]. Instead of dealing with the "underlying constitutional issues in clean-cut and concrete form," *Rescue Army v. Municipal Court*, 331 U. S. 549, 584 (1947), the plurality seeks a

[4] To avoid confusion, it should be remembered that the California Supreme Court in its opinion refers to a number of state "hit-and-run" statutes, including but not limited to the single statute involved in this case. *Byers* v. *Justice Court*, 71 Cal. 2d, at 1044–1045, 458 P. 2d, at 469–470.

broad general formula to resolve the tensions "between the State's demand for disclosures and . . . the right against self-incrimination." *Ante,* at [3]. But only rivers of confusion can flow from a lake of generalities. Cf. the opinion of my Brother BLACK, *ante,* at [2].

Much of the plurality's confusion appears to stem from its misunderstanding of the language, embodied in several of this Court's opinions, regarding questions "directed at a highly selective group inherently suspect of criminal activities." *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70, 79 (1965); see *Marchetti* v. *United States,* 390 U. S. 39, 47, 57 (1968). The plurality seems to believe that membership in such a suspect group is somehow an indispensable foundation for any Fifth Amendment claim. See *ante,* at [5]–[7]. Of course this is not so, unless the plurality is now prepared to assume that *McCarthy* v. *Arndstein,* 266 U. S. 34 (1924), *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892), *Garrity* v. *New Jersey,* 385 U. S. 493 (1967), and *Spevack* v. *Klein,* 385 U. S. 511 (1967), were based respectively upon the unarticulated premises that bankrupts, businessmen, policemen, and lawyers are all "group[s] inherently suspect of criminal activities." Instead, in the words of the California Supreme Court, "in each case the crime-directed character of the registration requirement was . . . important only insofar as it supported the claims of the specific petitioners that they faced 'substantial hazards of self-incrimination' justifying invocation of the privilege." 71 Cal. 2d, at 1043, 458 P. 2d, at 468. That this is so is evident from our emphasis in *Marchetti* that "we do not hold that these wagering tax provisions are as such constitutionally impermissible . . . . If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination . . . nothing we decide today would shield him from the various penalties prescribed by the wagering tax stat-

utes." 390 U. S., at 61. The point is that in both *Albertson* and *Marchetti*, petitioners arrived in this Court accompanied by a record showing only that they had failed to register, respectively, as Communists and as a a gambler, and that in fact they were such. Since neither of these facts was necessarily criminal, we had to determine whether the petitioners faced "real and appreciable" or merely "imaginary and unsubstantial" [5] hazards when they refused to register. That the petitioners belonged in each case to an inherently suspect group was relevant to that question, and that alone. By contrast, in the present case we are dealing with a record which demonstrates, as found by all three courts below, that respondent was charged by California both with illegal passing which resulted in an accident, and with failing to report himself as one of the drivers involved in that accident. It is hard to imagine a record demonstrating a more substantial hazard of self-incrimination than this. Yet the plurality somehow conclude that respondent did not face the "substantial risk of self-incrimination involved in *Marchetti*." [6] *Ante*, at [7].

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[5] *Brown* v. *Walker*, 161 U. S. 591, 599 (1896), quoting *Queen* v. *Boyes*, 1 B & S 311, 321.

[6] Even accepting the proposition that the Fifth Amendment applies only to statutory inquiries directed at persons who can demonstrate membership in a group inherently suspect of criminal activity, I find the plurality opinion confusing in its notion of how one determines the group at which a given statute is directed. Of course in one sense, every statute not naming the persons or organizations to whom it applies is directed at the public at large. The paradigm is a statute requiring "any person who does [or is a member of] X" to answer certain questions. The activity involved in *Sullivan* was the earning of income, in *Marchetti* was gambling, and in *Albertson* was belonging to the Communist Party. The plurality appears to agree that those statutes were, respectively, directed at income earners (very nearly the public at large), gamblers, and Communists. The statute before us directs any person who is the driver of an automobile *involved in an accident causing property*

The plurality opinion also places great reliance upon *United States* v. *Sullivan*, 274 U. S. 259 (1927). I had understood that case to stand for the proposition that one who desired to raise a Fifth Amendment claim to protect his refusal to provide information required by the Government on a tax return should make specific objection to the particular question on the return. Sullivan's sole objection was to disclosing *the amount of his income*, on the ground that it had been made in crime; he did not claim to be entitled to refuse to disclose his name and address. The Court suggested, although it did not decide, that it would in a proper case reject the claim as to *amount of income*.[7] It may be that *Sullivan* also stands for the proposition that an individual may not refuse, on Fifth Amendment grounds, to file a return disclosing his name and address, and by implication disclosing that he has earned some income during the previous year.[8] But that question was not raised in *Sullivan*, and the Court explicitly noted that it was not

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damage to answer certain questions. I would think, then, that it would be "directed at" drivers involved in accidents causing property damage. Yet the plurality states that it is "directed at all persons who drive automobiles in California." Apparently four members of this Court are willing to assume that *all* California drivers at some time are involved in an automobile accident causing property damage. I would hesitate before making such an assertion.

[7] Since the amount of income earned by an individual engaged in crime is usually neither relevant to his prosecution for such crimes nor helpful to police authorities in determining that he committed crimes, this would seem a logical suggestion. Of course, if disclosure of the amount of income criminally earned would create a not insubstantial risk of incrimination in any particular case, the privilege would apply.

[8] More precisely, the statute required returns only of those who had earned specified amounts of net or gross income, the precise amount depending on the individual's marital status. Revenue Act of 1921 c. 136, § 223, 42 Stat. 227, 250.

called upon to decide what information could be withheld; certainly I would expect this Court to hesitate before affirming the conviction of a fugitive from justice for filing a tax return which omitted his address. However that may be, I am frankly unable to understand just what the plurality think that *Sullivan* stands for. Rather than pursue the matter further, I simply note below those portions of the *Sullivan* opinion quoted or paraphrased in the plurality opinion. Portions there quoted are in Roman type; portions there paraphrased are enclosed in brackets; portions there omitted are in italics.

> "As the defendant's income was taxed, the statute of course required a return. . . . In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. *We are not called on to decide what, if anything, he might have withheld.* . . . [It would be] an extreme if not an extravagant application of the Fifth Amendment [to say that it authorized a man to refuse to state the amount of his income because it had been made in crime.] *But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon.*" *United States* v. *Sullivan*, 274 U. S., at 263–264. Cf. the plurality opinion, *ante*, at [4], [9].

I find even less persuasive the plurality's alternative suggestion, see *ante*, at [7]–[10], that the California statute involved here does not require individuals to

"provide the State with 'evidence of a testimonial or communicative nature' within the meaning of the Constitution." *Ante,* at [8]. To begin with, the plurality opinion states that "[c]ompliance with § 20002 (a)(1) requires two things: first, a driver involved in an accident is required to stop at the scene; second, he is required to give his name and address;" it later suggests that, conceivably, "it [could] be . . . inferred" that such a driver "was indeed the operator of an 'accident involved' vehicle." *Ante,* at [7], [8]. But, the plurality opinion continues, *United States* v. *Wade,* 388 U. S. 218, 221–223 (1967), rejects the notion that "such inferences are communicative or testimonial." *Ante,* at [8]–[9]. Putting aside the plurality's misreading of *Wade,* adequately dealt with my Brother HARLAN, *ante,* at [2], the initial problem with the plurality opinion is that it adopts a construction of the California statute that was explicitly rejected by the California Supreme Court. That court specifically stated that the statute involved here "requires drivers involved in an accident *to identify themselves as involved drivers.*" 71 Cal. 2d, at 1045, 458 P. 2d, at 470 (emphasis added). We have no license to overrule the California Supreme Court on a question of the construction of a California statute. Even if we did, however, I would still not be persuaded by the plurality's reasoning that since "[d]isclosure of name and address is an essentially neutral act," *ante,* at [7], any inferences which may be drawn from that disclosure are not "communicative or testimonial" in nature. *Ante,* at [8]–[9]. Apparently the plurality believes that a statute which required all robbers to stop and leave their names and addresses with their victims would not involve the compulsion of "communicative or testimonial" evidence.

III

Similarly, I do not believe that the force of my Brother BLACK's reasoning may be avoided by my Brother HARLAN's approach. He quite candidly admits that our prior cases compel the conclusion that respondent was entitled to rely on the privilege against self-incrimination as a defense to prosecution for failure to stop and report his involvement in an accident. *Ante,* at [5]. He would simply limit those cases because he believes that technological progress has made the privilege against self-incrimination a "threat" to "realistic" government that we can no longer afford.[9] To the extent that this argument calls for refutation, it is adequately disposed of in Mr. Justice Brandeis' dissenting opinion in *Olmstead* v. *United States,* 277 U. S. 438, 472–477, 479 (1928). Our society is not endangered by the Fifth Amendment. "The dangers of which we must really beware are . . . that we shall fall prey to the idea that in order to preserve our free society some of the liberties of the individual must be curtailed, at least temporarily. How wrong that kind of a program would be is surely evident from the mere statement of the proposition." HARLAN,

[9] "Technological progress creates an ever-expanding need for governmental information about individuals. If the individual's ability in any particular case to perceive a genuine risk of self-incrimination is to be a sufficient condition for imposition of use restrictions on the government in all self-reporting contexts, then the privilege threatens the capacity of the government to respond to societal needs with a realistic measure of criminal sanctions and other regulatory devices. To the extent that our *Marchetti-Grosso* line of cases appear[s] to suggest that the presence of perceivable risks of incrimination in and of itself justifies imposition of a use restriction on the information gained by the government through compelled self-reporting, I think that line of cases should be explicitly limited by this Court." *Ante,* at [17]–[18].

Live and Let Live, in The Evolution of a Judicial Philosophy 285, 288 (D. Shapiro ed. 1969).

In any event my Brother HARLAN's opinion is consistent neither with the present record nor its own premises. As to the first, my Brother HARLAN appears to believe that the imposition of use restrictions on the present statute would threaten the capacity of California "to respond to societal needs with a realistic mixture of criminal sanctions and other regulatory devices." *Ante*, at [18]. If so, this threat passed unperceived by the California Supreme Court: that court stated that its imposition of a use restriction "will neither frustrate any apparent significant legislative purpose nor unduly hamper criminal prosecutions of drivers involved in accidents resulting in damage to the property of others." 71 Cal. 2d, at 1054, 458 P. 2d, at 475.[10] It seems to have passed unnoticed by the California Legislature as well. The present statute applies to drivers involved in accidents causing property damage. California Vehicle Code § 20012 (Supp. 1971) requires similar, albeit more detailed, reports from drivers involved in accidents resulting in either personal injury or death. Yet the California Legislature itself imposed use restrictions upon the use of such reports. *Ibid.*[11] It is one thing to

[10] The opinion of the California Supreme Court is quoted at some length by my Brother HARLAN, *ante*, at [11]–[13]. Yet he somehow appears to conclude that that court did not mean what it said. For notwithstanding the language quoted above, he states that the California Supreme Court "concluded that interference with prosecutorial efforts in accident cases was not so important that it rendered the use restriction less palatable to the State than recognition of an outright privilege not to disclose." *Ante*, at [14].

[11] It could be argued that the use restriction created by the California Legislature is of lesser consequence—and therefore less burdensome—than that which was imposed by the California Supreme Court in this case. If so, however, under the premises of my Brother HARLAN's opinion, the appropriate response on our part

respect a State's assertion that imposition of a particular requirement will unduly hamper a legitimate state interest. It is quite another to flout the conclusion of the State's Supreme Court—and, so far as appears, of the state legislature as well—that imposition of a particular requirement is not at all inconsistent with the asserted state interests.

Moreover, I think my Brother HARLAN's opinion falls on its own premises. For he recognizes, and apparently would follow, our cases holding that the privilege against self-incrimination may be claimed by a witness in a noncriminal civil proceeding who is asked to give testimony that might indicate his commission of crime. *E. g.*, *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892); *McCarthy* v. *Arndstein*, 266 U. S. 34 (1924); *Hutcheson* v. *United States*, 369 U. S. 599 (1962) (HARLAN, J.). See *ante*, at [16]–[17]. He appears to believe that these case are different from the one before us, because they involve information "sought by a private party wholly for the purposes of resolving a private dispute," *ante*, at [16], where no "special governmental interests in addition to implementation of criminal sanctions are affected." *Ante*, at [17]. Yet this is precisely the case before us. For the only noncriminal interest that has ever been asserted to justify the California reporting statute at issue here is the State's interest in providing information "sought by a private party wholly for the purpose of resolving a private dispute." Of course state policy is exercised, in part, through the resolution of otherwise private disputes through the judicial process.

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would be not to hold that the privilege against self-incrimination could not be asserted, but at most to diminish the scope of the use restriction to that considered by the legislature to be consistent with the state interests asserted. There is no reason to protect those interests more than the legislature itself deems necessary.

But this is true of every civil case, whether it involves tort liability for negligent driving, the ability of private individuals to inherit from one another, *Labine* v. *Vincent*, 40– U. S. — (1971), or the right of private parties to dissolve a previous marriage. *Boddie* v. *Connecticut*, 40– U. S. — (1971) (HARLAN, J.). To distinguish the ordinary "civil lawsuit context," *ante*, at [17], from the civil lawsuit context in which the present statute is involved is simply to indulge in the sort of "artificial, if not disingenuous judgments" against which my Brother HARLAN'S opinion otherwise warns. *Ante*, at [8].

Finally, even if everything else in my Brother HARLAN'S opinion be accepted, I cannot understand his concurrence in the result. For the California Supreme Court *agreed* with his conclusion that the privilege against self-incrimination does not provide a defense to an individual who fails to comply with the statutory reporting requirement. 71 Cal. 2d, at 1057, 458 P. 2d, at 477. But it nevertheless concluded that *respondent* should not be punished because it would be "unfair" to do so. 71 Cal. 2d, at 1058, 458 P. 2d, at 478. Although my Brother HARLAN concludes that the Fifth Amendment does not excuse compliance with the California reporting requirements for reasons quite different from those relied upon by the California Supreme Court, the point is that both have reached the same conclusion. Of course we have already held that due process is denied an individual if he is led to believe that the privilege against self-incrimination applies when he refuses to answer questions, and subsequently prosecuted on the grounds that it does not. *Raley* v. *Ohio*, 360 U. S. 423 (1959). One would assume that in such circumstances my Brother HARLAN would, although for very different reasons, agree that the judgment of the California Supreme Court should be affirmed.

IV

Although, strictly speaking, the only question before us is whether respondent may be punished for failing to comply with the statutory requirement at issue,[12] I am constrained to add that I cannot agree with the California Supreme Court's conclusion that the requirement may be enforced if the State is merely precluded from using the compelled evidence and its fruits in a criminal prosecution. When, as in the present case, the statute requires an individual to admit that he has engaged in conduct likely to be the subject of criminal punishment under the California traffic laws, the requirement in my view may be enforced only if those reporting their involvement in an accident pursuant to the statutory command are immune from prosecution under state law for traffic offenses arising out of the conduct involved in the accident. See *Piccirillo* v. *New York*, 400 U. S. 548, 550–551 (1971) (DOUGLAS, J., dissenting); *id.*, at 561–573 (BRENNAN, J., dissenting); *Mackey* v. *United States*, — U. S. —, — (1971) (BRENNAN, J., concurring).

[12] Although the case was tried and decided prior to our decisions in *Marchetti* v. *United States*, 390 U. S. 39 (1968), and *Grosso* v. *United States*, 390 U. S. 62 (1968), the principles of those cases must be applied here. *United States* v. *United States Coin & Currency*, *ante*.